86 1545

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

In Re FRANK KOWALIK, JR.,
Petitioner pro se

PETITION FOR WRIT OF HABEAS CORPUS

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Date: March 13, 1987

125pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CLAIMS

1. I was not duly convicted for violation of 26 USC Sec. 7203 since this statute is not applicable to me. Congress limited the jurisdiction of the District Courts under 26 USC 7203 to specific persons who voluntarily placed themselves in a fiduciary position regarding the property of a principle and specifically described such person in 26 USC 7343. I am not such a person, nor was I charged with being such a person.

   Cognizance of this lack of jurisdiction was evident from the conduct of government actors for jurisdiction was never stated for the record, and when questioned not answered.

2. Due Process was violated when a knowingly false charge was made against me by INFO. (not attested to under oath as required by Court rules), and done for unlawful purpose.

Congress never made it mandatory for a person to disclose information about their personal property in a return, for to do so would violate common law rights secured to them in the 1st, 4th, and 5th Amendments to the United States Constitution. Also, Congress has never taxed remuneration received for personal labor in the private sector. I introduced a law that has taxed wages of Federal Government employees since 1862. Such a law is not possible for workers in the private sector unless apportioned as required by the Constitution for a direct tax.

Hence, the Justice Dept. knowingly brought a fictitious action against me, in collusion with the IRS, to coerce me into creating liability in debt in favor of the IRS against my will and/or use the courts and an uninformed jury to obtain implied control over property which is outside the de jure authority of the IRS,

causing a form of involuntary servitude.

3. Notwithstanding the lack of jurisdiction over me as to the subject matter and the improper charge and summons, the evidence was insufficient in law to sustain a conviction.

Even if the service was proper and even if the court had jurisdiction, no law creating a duty upon me to make returns was placed into evidence making proof of willfulness impossible. The record is that a condition of voluntariness existed.

The prosecution relied upon my prior conduct of making returns to imply the existence of a law to jurors whose experience and conditioning with regard to making returns would permit them to convict based upon presumption and conjecture. Also, use of presumptive evidence shifted the burden of proof to me and violated Due Process.

Recognition of the foregoing was blocked by the partiality of the Judge to the prosecution, as well as the first allegiance of my attorneys to the Courts and not to me.

4. Premature and improper use of 18 USC Sec. 3143(b)(2) by the Dist. Ct. in denying me bail pending appeal violated Due Process and caused the 10th Cir. Ct. of Appeals to circumvent their duty to address the substantive issues of law and fact presented to them in my appeal.

5. The entire action was for unlawful purpose in a court lacking jurisdiction and in violation of due process. It resulted in my not being duly convicted, deprived me of life, liberty and property, and violate my civil and constitutional rights.

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ABRIVIATIONS

INFO.	-Charge by Information.
Dist. Ct.	-Federal District Court of Colorado.
10th Cir.	-Federal Tenth Circuit Court of Appeals.
IRS	-Internal Revenue Service.
U.S.C.	-United States Codes.
I.R.C.	-Internal Revenue Code (Title 26 U.S.C.)
Sec.[no.]	-Sections found in 1954 I.R.C.
Exh.	-Exhibits Appended.
F.C.I.	-Federal Correctional Institution.
PSI	-Presentence Investigation Report.
TT	-Trial transcript.
T	-Transcript of hearings.

LIST OF ACTORS & ROLES

FRANK KOWALIK, JR.: Petitioner, prisoner: citizen of the United States and presently of the State of Oklahoma; citizen of the State of Colorado and worked in the private sector at the time of the alleged offence; acting pro se since April 1985; employed counsel for the first trial and an en banc appeal on the issue of 18 USC 3143(b)(2) when denied bail pending appeal.

Government representatives:

THOMAS M. O'ROURKE, Asst. U.S. Attorney representing Robert N. Miller, U.S. Attorney, Denver, Colorado: prosecutor in both trials and appellee.

ZITA L. WEINSHIENK, Judge in the District Court of Colorado: presided in both trials.

LIST OF ACTORS & ROLES (continued)

DONALD E. ABRAM, Magistrate in the District Court of Colorado: presided over pretrial hearings (including the special appearance made prior to my second trial 9/22/86) and the temporary release hearing 12/8/86.

HILBERT SCHAUER, Magistrate in the District Court of Colorado: presided over release hearings 11/14/84 & 11/15/84.

ROBERT L. HEOCKER, Clerk of the Tenth Circuit Court of Appeals, Denver, CO.

MONROE G. McKAY, Appellate Court Judge, 10th Cir.: Direct and en banc panel.

JAMES K. LOGAN, Appellate Court Judge, 10th Cir.: Direct and en banc panel.

STEPHANIE K. SEYMOUR, Appellate Ct. Judge, 10th Cir.: Direct and en banc panel.

STEPHEN H. ANDERSON, Appellate Ct. Judge, 10th Cir.: Petitions for Writ of Mandamus, Habeas Corpus, Restraining Order & en banc panel.

JAMES E. BARRETT, Appellate Ct. Judge, 10th Cir.: Petitions for Writ of Mandamus, Habeas Corpus, Restraining Order, Stay of Surrender, Exparte Motion & en banc panel.

JOHN P. MOORE, Appellate Court Judge, 10th Cir.: Motion for Stay of Surrender, Exparte Motion, & en banc panel.

DEANELL REECE TACHA, Appellate CT. Judge, 10th Cir.: Motion for Stay of Surrender, Exparte Motion, & en banc panel.

LIST OF ACTORS & ROLES (continued)

WILLIAM J. HOLLOWAY, Appellate CT. Judge, 10th Cir.: En banc panel only.

BOBBY R. BALDOCK, Appellate CT. Judge, 10th Cir.: En banc panel only.

KENNETH BATSON, IRS Special Agent. First Special Agent investigating me. Said criminal investigation terminated and sent on to civil division even though TC-914 reflected criminal investigation on going. Testified at first trial.

HAROLD G. WARREN, IRS Special Agent. Asigned to my case file after employment records procured from receiver in court ordered bankruptcy. Testified at first trial, attended second trial.

SHERI BETZER, IRS Revenue Agent. Installed as an expert witness in both trials.

TRUDY WOOD, IRS tax examiner. Testified at both trials.

RICHARD WEIDGER, co-employee in private sector during years in question, now auditor for the Inspector General's Office, Federal Emergency Management Agency. Testified at both trials.

GRACE S. CHAVES, U.S. Probation & Parole Officer, Denver, Colorado: Prepared PSI reports after both trials.

T.C. MARTIN, Warden, F.C.I. P.O. Box 1500, El Reno, Oklahoma 73036

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PETITION FOR WRIT Of HABEAS CORPUS

COMES NOW, FRANK KOWALIK, JR. pro se, petitioning this Court to accept and exercise appellate jurisdiction in granting relief to me by the issuance of a Writ of Habeas Corpus pursuant to the Constitution of the United States and under 28 USC Sec. 1651 and 2241(a) and (c)(1)(2) (3); and if necessary, issue an order to the appropriate governmental party to show cause why I should not be immediately released from prison pending a determination of this petition; as well as to show cause why I should not be released from prison permanently and restored to my previous status and/or use whatever procedure proper to elicit facts necessary to help this Court

to dispose of the matter as law and justice require under 28 USC Sec. 2243.

Further, in compliance with the last paragraph of 28 USC Sec. 2242, I ask that discretionary power be exercised to accept and rule on this application though the only petitions for Writ of Habeas Corpus to the lower courts were made prior to my second trial. They essentially contained the same information and arguments presented herein and were summarily denied. My primary contention being 26 USC 7203 was not made applicable to a person in my status by Congress and so no jurisdiction over me as to the subject matter was never in the Dist. Ct. Government actors in the lower courts have never answered this claim, nor has a statement of jurisdiction ever been offered by them throughout my ordeal.

Without jurisdiction firmly in the Dist. Ct., I feel a petition to them would be inappropriate as well as futile.

Application for such a Writ to the 10th Cir. requires my consent. This I will not voluntarily provide because of their subjective handling of the direct appeal of my first trial and the petitions and motions (including petitions for Writ of Mandamus and Habeas Corpus) prior to the second trial. All of which received less than full and fair consideration.

I realize discretion to place this petition in the Dist. Ct. is possible under 28 USC Sec. 2241(b) if that court truly has jurisdiction to entertain it. I feel such an act could only impede the administration of justice for it will surely prolong my unlawful imprisonment. I therefore pray the exceptional circumstances outlined in my Claims are sufficient in law and fact for justice to be administered in this higher court.

Having been denied bail pending appeal, making the judgment final, I believe this is the only Court that can

objectively answer the claims I have raised and arrive at a decision that is constitutionally just.

I am presently confined in the F.C.I., El Reno, Oklahoma, serving a sentence of two years under 26 USC Sec. 7203 imposed by Zita L. Weinshienk, Dist. Ct. Judge, Nov. 14 & 15, 1984 and Dec. 8, 1986. My imprisonment is a result of being denied bail pending appeal pursuant to 18 USC Sec. 3143(b)(2), as implemented since October 12, 1984.

I pray this Court will take jurisdiction and also allow a degree of latitude in the form and content of this petition as it is not only being prepared by a pro se, but is a result of two and a half years of litigation in the lower courts, making the documentation voluminous. Any deviations is intended to aid this Court in its understanding of the case and not an attempt to alter any rules or decorum of the Court. Also, may this Court permit me to amend for any deficiency herein.

STATEMENT OF THE CASE

In July 1984 I was accused by INFO. (not attested to under oath) of violating Sec. 7203, Willful Failure to Make Returns for the years 1978 and 1979 [Exh. "A"]. In those years I was employed in Denver Colorado as a real estate sales manager for Income Realty and Mortgage, a firm dealing with the general public.

I challenged jurisdiction by letter addressed to the Clerk of the Dist. Ct. prior to appearance before the Magistrate in response to the summons (made at the insistence of my attorney) and again at that hearing. My jurisdictional challenge was ignored, and when I would not enter a plea Magistrate Abram entered "not guilty" for me, and scheduled trial.

Trial by jury Sept. 17-19, 1984 in Dist. Ct. resulted in a conviction. On Nov. 14, 1984 I was sentenced to two years in prison and $20,000 fine with bail pending appeal granted. After posting

bail and filing a Notice of Appeal on the 14th Magistrate Schauer did not carry out the judgment rendered 11/14/84, but instead had me held in custody of the executive branch of government over night. I was brought to court on the 15th and received a second sentencing, which revoked bail pending appeal pursuant to 18 USC 3143(b)(2), in a court that lacked jurisdiction. Only date change on the Judgment Order of the 14th was a hand written redate of the docket entry and a stamped date by the Clerk's office.

Imprisonment commenced Dec. 5, 1984 under that judgment, and continued through June 28, 1985 when I was released on bail pending appeal because of a hearing ordered by the en banc panel of the 10th Cir. on the bail issue [765 F.2d 944].

The first trial and the en banc appeal were handled by attorneys I discharged in April 1985. Thereafter, I proceeded pro se in my direct appeal of the case, my

second trial, and production of all filings in the lower courts.

The direct appeal resulted in reversal of the conviction and judgment July 15, 1986 [Exh. "B"] on a jury instruction without addressing the issues of jurisdiction, law, and fact presented in the appeal; thereby technically allowing remand and denying me a claim of double jeopardy attaching to the first trial. My petition to the 10th Cir. for rehearing [Exh. "C"] was summarily denied.

My challenges to the remand for new trial, including petitions for writs of habeas corpus to both lower courts, were to no avail.

The $20,000.00 I posted as an appeal bond was confiscated by the Dist. Ct. when I did not execute an unsecured bond giving that Court my consent to be tried again in Federal Territory for an offense allegedly committed in Denver. This did not prevent the trial, as the Dist. Ct. ordered my

arrest and I was transported to Denver by the Justice Department.

The second trial by jury, held Nov. 3-5, 1986, resulted in a conviction. The Dist. Ct. again ordered my imprisonment under 18 USC Sec. 3143(b)(2) at the sentencing held Dec. 8, 1986, even though the Court stated twice at this hearing that a jury instruction was questionable. All of my motions presented to the Dist. Ct. prior to the second trial were summarily denied [Exh. "D"]

I filed a Notice of Appeal on Dec. 8th and followed up with motions to both lower courts requesting a stay of my incarceration [Exh. "E"] pending a determination by the 10th Cir. of a formal Motion for Bail Pending Appeal. I was lead to believe my only option was appeal to the 10th Cir., however, documentation received from that court regarding appeal procedure asked me to state under what statutory jurisdiction I felt they could act. This plus a

telephone call from Mr. Hoecker, Clerk of the 10th Cir., on Fri., Dec. 19th, notifying me he could not submit my Motion for Stay of Incarceration until my Motion for Bail Pending Appeal was filed (which required the Docketing Statement conferring jurisdiction to that Court) triggered a study of the statutes on Appellate Court jurisdiction that revealed they lack jurisdiction to act in this case absent my declaration and consent. This caused me to file an Ex Parte motion in the 10th Cir. for clarification of jurisdiction [Exh. "F"]. When I called Mr. Hoecker on Monday, Dec. 22nd to verify that my Ex Parte Motion had arrived and could be addressed by the court he did not inform me that he had sent my Motion for Stay of Incarceration to them as well, and I did not bring this up since he had told me three days earlier that he could not send it on to the court for consideration. The result was a decision on Dec. 23rd stating

they elected to treat my "Motion for Stay of Incarceration" as a Motion for Bail Pending Appeal and denied it saying it was insufficiently supported, thereby changing the intent of that motion; and avoided the questions on jurisdiction in my Ex Parte motion by stating it was an "improper motion".

My requests for revocation of my Notice of Appeal have received strange responses that indicate to me the lower court's strong desire to have me bring an appeal and confer jurisdiction to them over the actions against me.

Though I walked into the F.C.I. on Dec. 29, 1986, my submission for incarceration is not to be considered a voluntarily made act.

CLAIMS & SUPPORT OF PETITION

I.
I WAS NOT CHARGED OF A CRIME

Sec. 7203 dictates the maximum punishment for any "person required" by

law or regulation to make returns, whose failure to do so was "willful", and who was duly convicted. The language of Sec. 7203 clearly indicates there are component parts to the offence; namely the accused "person" must be one who is "required".

> "...or where by implication, other constituents are component parts of the offence; as where the words of the statute defining the offence have a compound signification, or are enlarged by what immediately precedes or follows the words describing the offence. ..." U.S. v. Cruikshank, 92 U.S. 542, 564 (1875).

The INFO. did not charge me of a crime when it did not identify me as the "person" described in Sec. 7343 who can be subject to the criminal sanctions in Sec. 7203. Such defect can be noticed at any time, U.S. v. Manuszak,234 F.2d 421(1956).

Central to every prosecution under a statute is determining what the subject actually is, Russell v. U.S., 369 U.S.749, 764 (1961). The core of criminal pertinency in Sec. 7203 is that the accused is, or is not, the "person" in the

subject matter of "willful failure to make returns".

As in all Special Laws, Congress supplied a definition distinctly limiting a criminal charge under Sec. 7203 by the definition in Sec. 7343.

> Sec. 7343. Definition of term "person"
> The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.
> (emphasis added)

This definition was made applicable to all of Chapter 75, Crimes, Other Offences and Forfeitures (Sections 7201 through 7344) when the I.R.C. was recodified in 1954. Prior to that, the 1939 I.R.C. repeated this definition in all criminal penalty sections.

By limiting the criminal penalties to specific persons "under a duty" as a fiduciary (reporting on the activities and property of others) Congress kept the sanctions and the tax laws within

constitutional bounds, as this did not usurp the Constitutional rights of the person reporting. Also, a person described in Sec. 7343 from the private sector cannot be under a "duty" to report and create personal liability in debt in favor of the IRS on any of his own personal property, through declaring it as "income" for Federal income tax purposes, against his will. This is prohibited to the Federal Government by the Constituion, as is involuntary servitude.

The prosecuting attorney made no attempt to establish either in the INFO. or in trial that I was the statutory person in Sec. 7343 who could be charged criminally pursuant to Sec. 7203, yet this was his burden to prove. He was obviously aware of the deficiency since he <u>did not attest to the charge under oath</u>.

The Dist. Ct. was also aware of this criteria when it stated in chambers prior to the commencement of my first trial:

> "I don't think there is any way that I'm not going to be instructing as a matter of law that he has the duty or the -- I won't say has the duty, because I can't do that in a criminal case." (11/14/84 TT 59:12-15)
> (emphasis added)

The IRS Handbook for Special Agents clearly spells out the requirement to sustain a conviction in a charge under Sec. 7203, at 415.21 (1-18-80) P. 9781-260 as follows ;

> (1) the following elements of the offence must be established to sustain a conviction: the person under a duty, as required by law or regulations ...
> (a) ... persons liable under IRC 7203 includes those described in IRC 7343.

A statutory definition which declares what a term "means" excludes any meaning that is not stated. Colautti v. Franklin, 439 US 379 (1978).

When the government charged me with violation of Sec. 7203, knowing from my past returns and other information in their possession that I am not the statutory person defined in Sec. 7343, it is selective prosecution intended to force

me against my will to relinquish my 1st Amendment right of free choice in the creation of lability in a debt in favor of the IRS through a personal declaration in a return. This is not lawfully possible as stated in Clyatt v. U.S., 197 US 207, 214-215 (1904).

To mandate me to make a return regarding my personal property, and criminally punish if I refuse, is to mandate I relinquish my rights under the 1st, 4th*, and 5th** Amendments. It would abuse due

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* "It does not require actual entry upon premises and search for the seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or a forfeiture, is within the spirit of the meaning of the Amendment.
Boyd v. U.S., 116 U.S. 616, (1885)

** "The Fifth Amendment provision that the individual cannot be compelled to be a witness against himself cannot be abridged." ... "where rights secured by the constitution are involved, there can be no rule-making or legislation which abrogate them.
Miranda v. U.S., 384 U.S. 436, (1966)

process, violate the 8th Amendment by inflicting cruel and unusual punishment, and violate the 13th Amendment, as well as cause abrogation of the 10th Amendment.

For this reason, Congress constructed the income tax laws using permissive language***, thereby allowing the Supreme Court in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, (1915) to recognize the form of the tax as indirect. However, that Court qualified the status of the tax if the enforcement affected

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** "The information revealed in the preparation and filing of an income tax return is, for Fifth Amendment analysis, the testimony of a 'witness' as that term is used herein." Garner v. U.S., 424 U.S. 648,656(1975)

** "There can be no question that one who files a return under oath is a witness within the meaning of the Amendment." Sullivan v. U.S.,15 F.2d 809,812(1926)

*** "If necessary, to avoid unconstitutionality of a statute, 'shall' will be deemed equivalent to 'may'." Gow v. Consolidated Coppermines Corp., 165 Atl. 136
George Williams College v. Village of Williams Bay, 7 NW 2d 891 (1943)
Fort Howard Paper Co. v. Fox River Hts. Sanitary Dist. 26 NW 2d 661

matters of substance when it said:

> Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, ..." (pp. 16-17) (emphasis added)

Can it be denied that attempting to enforce this indirect tax through court action and depriving a citizen of his life, liberty, and property, in order to pressure him into relinquishing common law rights, secured to him Constitutionally, affects matters of substance that transforms the tax into a direct tax in need of apportionment?

The Court also invited error by denying my request that the jury be provided the definition of "person" in Sec. 7343. It accepted the prosecuting

attorney's assertion that it applies only to preceding sections about corporate forfeiture [11/3/86 TT p. 207] over the congressional authority in the statute which plainly says it applies to the entire Chapter. The Court further said it had nothing to do with who is required by law or regulation to make a return [11/3/86 T. p. 202] This would have been accurate if she had used the word "asked" in place of "required", for we are all asked to make returns but only persons under a "duty" can be required to by law and punished pursuant to Sec. 7203. U.S. v. Cruikshank, supra; Russell v. U.S., supra.

Not being identified as the person described in Sec. 7343, I was not charged as to a crime pursuant to Sec. 7203, and could not be duly convicted.

II.
TRUE NATURE & CAUSE NOT CHARGED

The vague reference in the INFO. to "required by law" did not inform me as to what I must be prepared to defend.

The entire action hinged on my prior conduct of making returns to establish an inference sufficient for the jury to convict based upon their own experience. However, only a Positive Law can produce an ascertainable standard of guilt. Screws v. U.S., 325 U.S. 91,102 (1944).

Without a specific law stated in the INFO., the subject (a "duty" put upon me to perform the act) was not sufficiently identified. And, with no specific law, or specific type return I was supposedly required to make, placed into evidence a "willful" failure charge is not possible, making the cause of action non existent.

An IRS employee, Ms. Wood, brought in the government Forms 4340, which she testified reflects the record the IRS has under my Social Security number. These

Forms were introduced as proof that I had filed returns in the year 1975 and prior, but did not in the years 1978 and 1979. This only went to prove my conduct with regard to filing.

Each return I made in past years was a unilateral declaration of personal liability in favor of the IRS (which I was coerced into making) that unwittingly caused a waiver of my constitutional rights; they did not constitute an on going agreement to create a personal liability in debt in favor of the IRS each April 15th. Yet, the governments evidence was used to imply precisely this, forcing my life, my freedom, and my rights to be bartered away by my past conduct of making returns.

> "A man may not barter away his life or his freedom, or his substantial rights. .... He cannot, ..., bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."
> Home Insurance Co. v. Morse, 20 Wall. 445,451 (1874)

The evidence presented only went to prove my creation of liability in debt in favor of the IRS is a supposedly voluntary act. When I made returns I created liability in favor of the IRS, and when I did not make returns no liability was created [Exh."G","H","I"]. These Forms for the years 1978 and 1979 specifically stipulate that "I was not liable this period", assessments "zero", credits "zero", balance "zero"; but the forms for the years I did file reflect assessments in the amount I declared (under penalty of perjury) on a tax return as the amount I owed, along with payments and credits. This evidence is the IRS stipulation that since I had not made myself liable to them in the years 1978 and 1979 I was not under the jurisdiction of Title 26, also making the charge "false".

Voluntariness was manifestly clear at sentencing when, after being found guilty of not making returns in two trials, the

prosecuting attorney did not ask the Court for relief or restitution; and the Court attempted to bribe me with reduced prison time IF I cooperated with the IRS and made returns [11/14/84 TT P.513-515]. This was in contradiction to that same Court's position in a case where the defendant stipulated he was a "person required" to make returns. In that case the Judgment ordered him to file returns and then after his second trial, where he did not stipulate, that requirement was not in the Judgment [U.S. v. Phillips, Criminal Action 82-CR-68, Fed. Dist. Ct. of Co.]. This confirms it is the individual that creates the obligation. It also reveals I was punished one year for not expressing the "will" of the IRS.

The prosecuting attorney's evidence also proved that the subject was not "willful failure to make returns" but was "willful failure to create liability in debt in favor of the IRS" through the

"act" of declaring my personal property as income for Federal income tax purposes through the vehicle of a "return".

The condition of voluntariness made a charge of "willful failure to make returns" impossible since a determination of willfulness is only possible by comparing my conduct to a specific law, which was not in evidence.

> Of Course, willful conduct cannot make definite that which is undefined.
> Screws v. U.S., supra at 105

> Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.
> Screws v. U.S., supra., at 107

Questions arise of collusion between the Justice Dept., the IRS, and the lower Courts in their hope that this action of undue influence will compel my specific performance of creating liability in debt that could not be lawfully accomplished directly, and goes to returning me to involuntary servitude considering my past

returns were made under duress and coercion. Such action starts with a fictional pleading.

III.
INVALID CHARGE NEEDED DECEPTION FOR CONVICTION

Part of the fictional pleading in the INFO. was identifying a lump sum figure as "gross income", knowing it consisted primarily of compensation received for personal labor in the private sector; with only $390.27 established as net receipts for dividends and interest in 1978 and $1,109.90 net dividend in 1979.

The INFO. then stated "that by reason of such income, he was required by law", without stating any "law" that taxes remuneration received for services in the private sector and requires it be declared as "income" for income tax purposes. These false statements were intended to mislead the jury and shifted the burden of proof to me that my personal compensation is not income.

At my second trial, I placed into evidence the law that imposed an employment tax on Federal employees (12 Stat. 472, (1862), Sec. 86.) and stated when that employment tax was placed under "income tax" (13 Stat. 281, (1864), Sec. 123). I asked the government to state a similar law that clearly taxes remuneration received by those working in the private sector. (This same request was made by me of the government several times, including in the direct appeal of my first trial). They made no attempt to supply such a law to the jurors, or answer the question in my direct appeal.

My cancelled commission checks were obtained from a court appointed receiver after the firm I was working for in 1978 and 1979 was forced and ordered into liquidation by the Court; and after IRS Special Agents were unsuccessful in procuring employment information from my employer, raising questions of

admissibility.

Ms. Betzer, an IRS employee, was installed as an expert witness in both of my trials (over objection at the second trial). Her expertise was established by her accounting degree and the 20 weeks basic income tax training by the IRS, which certified her as an instructor for the IRS. She testified that she was not an attorney and had no legal background. The Court installed her under Rule 702, Rules of Evidence, as:

> "an expert in auditing tax returns and from the point of view of an accountant determining when taxes should be filed." [11/3/86 TT p. 138]

after the prosecuting attorney asked that she be installed as:

> "an expert in the field of examining income to determine whether a person is required to file income tax returns." [11/3/86 TT p. 136].

This attempted falsehood, which had its effect, mislead the jurors as there is a big difference between Ms. Betzer being an expert on "when taxes should be filed" and "whether a person is required to file".

Relying on the I.R.C., she was allowed (over objection) to state I was required to file based upon the amount of monies I received in the form of commissions, yet she did not know of any law passed by Congress that specifically places a tax on salaries in the private sector, similar to the one I introduced into evidence that specifically and clearly places a tax on the salaries of those paid by the Federal Government*, making her testimony hearsay, incompetent, and intended to prejudice me by false testimony.

At my first trial, she testified she did not know of any court definition of

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* The I.R.C. reveals the limitation of the employment tax in the definitions in found in Sec. 3401(c) & (d), which restricts the term "wages" in Sec. 3401(a) and the requirement of W-4 forms in Sec. 3402 to government employees.

The IRS was given permission by Congress to provide for withholding on a source other than wages (i.e. compensation for work in the private sector) voluntarily agreed to by the person making and the person receiving the payment [Sec. 3402(p)], which makes the execution of a W-4 form in the private sector voluntary.

"income", but knew "income" was NOT defined in the I.R.C. Not knowing the Courts legal definition of "income", she was allowed to state what constituted "gross income". She was incompetent as an expert to attach an adjective to a word when she did not know the legal meaning of that word, using only the I.R.C. and her IRS training to establish her basis to state that legal opinion. Her testimony exceeded her court recognized expertise, but was permitted to be used over objection in the second trial.

Here Ms. Betzer was used to determine the facts and the law for the jury. However, Justice requires the best witness available be used under "expert witness" rules. The government has attorneys on their staff that could have provided a proper foundation for the jury to make an informed decision, and falsehood would not be possible. In essence, knowing her testimony to be incorrect, the government

allowed perjured testimony to be presented to the jury, and:

> "contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."
> Mooney v. Holohan, 294 U.S. 103,112 (1934)

As acknowledged in Alcorta v. Texas, 355 U.S. 28 (1957), under the general principles laid down by this Court in Mooney v. Holohan, supra, Pyle v. Kansas, 317 U.S. 213, I was not accorded due process of law.

The Court is Screws v. U.S., supra at 106, adopted the following from Brown v. Mississippi, 297 U.S. 278, 285,:

> ...it is plain that basic to the concept of due process of law in a criminal case is a trial - a trial in a court of law, not a "trial by ordeal".

IV.
JUDGE IS PARTIAL TO PROSECUTION.

The Dist. Ct. refused to recognize the distinction between remuneration received

from private employers and the government as the employer, though it had a duty to take cognizance of facts when evidence is presented.

> "To inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Russell v. U.S., supra. at 768

Further confusing the jurors, the Court provided it's own definition of "gross income" in jury instruction #13 *, that contradicted the I.R.C. definition given in instruction #12 **. The I.R.C. indicates "gross income" is something FROM not ON the items listed, yet the Court said gross income includes [the items

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* Jury Instruction #13 (in part)
Gross income includes compensation for services, including wages, fees, commissions and similar items, as well as interest and dividends.

** Jury Instruction #12
Section 61(a) of Title 26 of the United States Code defines "gross income" for purposes of income taxation as "all income from whatever source derived, including (but not limited to) ... compensation for services, including fees, commissions, and similar items; ... interest ... [and] dividends." (emphasis added)

listed] thereby placing the tax ON the source (which would be a direct tax).

Additional plain error was caused by the Court when it tried to direct me in my defense by implying a jury instruction on good faith misunderstanding could not be given unless I took the stand [11/3/86 TT p. 176], and it participated in the prosecution by suggesting a defence [11/3/86 TT 172]. The Court solicited it's appointed advisory counsel to assist it in accomplishing this end, knowing my taking the stand to defend the element of willfulness would imply I knew I was under a duty to file, thereby pretending validation of the charge. The instruction [No. 14] was given despite the fact that I did not take the stand or subsequently offer any evidence that could justify a change in the Courts position. The Court's conduct further proves the entire action was a collusive action of extortion.

V.
PUNISHED FOR ALLEGED VIOLATION NOT STATED IN THE INFO.

A look at the prosecuting attorney's statements at the sentencing hearings reveal the government will have me punished for that which was not charged. Also, the liability in debt the charge intended to accomplish for the IRS was not part of the charge.

At the 1984 hearing the prosecuting attorney said I should be punished (1) for arrogance, (2) for not being remorseful, (3) for picking and choosing the laws I will abide by, and (4) to serve as an example to deter myself and others from not making returns.

As to "pick and choose the laws" that I will abide by, I have repeatedly asked the government to state the law applicable to me that creates the "duty" implied in the INFO. To "abide by" is to accept the consequences of; a matter of choice.

Before my act of abiding is considered voluntarily made I must be made aware of the legal consequences accepted and the defences surrendered by those who will have me so act, Miranda v. Arizona, supra. Instead the IRS used coercion, fear, and deceit to create the compulsion whereby I did involuntarily abide by their will in the past in the making returns, which I claim is extortion.

For specific intent the prosecuting attorney must prove I had a bad purpose to deprive the IRS of a percentage of my property lawfully due them as implied in the charge. In both trials, the court charged the jury generally as to bad purpose and instructed:

> "The government is not required to show that taxes were due and owing as an essential element of the offenses charged in the information." [9/17/84 TT 473:6-8] [11/3/86 TT 257:22-24].

This would be accurate if the "person" accused is restricted to one described in Sec. 7343 who is under a duty to make

returns regarding someone else's property, since any tax due and owing by the principle would have no bearing on the accused person's specific intent to disobey that duty.

Exception was taken to the fact that the government did not place into evidence the specific law needed to prove specific intent. No exception was taken to the "bad purpose" charge, however, Screws v. U.S., supra (on willfulness, specific intent, and bad purpose) at 107 states:

> "And where the error is so fundamental as not to submit to the jury the essential ingredient of the offence on which the conviction could rest, we think it is necessary to take note of it on our own motion."

And at 104:

> "For the specific intent required by the Act is an intent to deprive a person [Federal agency in my case] of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."

Without stating a law that clearly and positively describes the duty, the duty is

merely inferred and so can only be presumed proven by inference.

> "...there can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute."
> U.S. v. Lacher, 134 U.S. 624,628(1889)

> "Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.
> U.S. v. Classic,313 U.S. 299,332(1940)

The Court, at my sentencing hearing in 1984 offered me a choice of two years in prison, or one year in prison and one year on probation IF I cooperated in the making of returns [11/14/84 TT 513-515]. This makes unequivocally clear the necessity for ME TO DECLARE my property is "INCOME" before I and my property are subject to the jurisdiction of the I.R.C.

When I did not succumb to the Court's coercion, I was sentenced to two years in prison. One year for not expressing the "will" of the IRS and one to serve the IRS as an example to deter me and the balance of society from exercising our First

Amendment rights. The latter punishment was requested by the prosecuting attorney [11/14/84 TT p. 510] and acknowledged by the Court [11/14/84 TT p. 517] [Also, see Exh. "P"]. To serve the IRS for such a cause is violative of my civil rights and the 13th Amendment.

In the sentencing hearing of my second trial [12/8/86 T. pp. 7-8] the government dropped their standard reference to arrogance and serving as a deterrence to society and said I acted under "greed".

He began his statement by saying "there really isn't all these issues as far as the government is concerned." Yet, my direct appeal of the first trial primarily contained issues of abrogation of constitutional rights, lack of jurisdiction over me as to the subject matter in this prosecution, and the fact that my conduct was not compared to any duty imposed by law. Are these not issues of concern to the government?

The prosecuting attorney also attacked my 1st Amendment right of association, and I charge selective prosecution resulted from my membership in N.C.B.A. [Exh. "O"].

I was not made aware of the nature of the Government's specific subject up front in the charge, nor was I apprised that due process does not apply to my prosecution under Sec. 7203 because I am not the "person" described in Sec. 7343. I did not know a vague charge stating "as required by law" meant I must relinquish common law rights, secured to me under the Constitution, and allow the government actors to act, under color of law and/or under color of statute, as an enforcement arm of the IRS in depriving me of rights, privileges, and immunities and strip me of life, liberty, and property for the "crime" of arrogance, lack of remorse, picking and choosing, and greed; and then end up serving the IRS involuntarily for not expressing their "will".

"...it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." Garner v. Louisiana, 368 U.S. 157, 164 (1961)

Being punished for that which was not charged violates the 5th, 6th, 8th and 13th Amendments to the Constitution of the United States, causing the conviction to be UNLAWFUL and void.

VI.

I WAS NOT DULY SUMMONED

A charge by Information not made under oath is fatally defective for it does not comply with court rules. This was fully argued in the appeal of my first trial. The prosecuting attorney subjectively supported his position that such oath was not necessary when the charge is made by INFO. with court cases that did not meet the test.

Example: in U.S. v. Hughes, 311 F.2d 845 (3rd Cir. 1962), the Court interpreted

the "letter and spirit" of Fed. Rules of Cr. Proc. Rule 7's requirement that an indictment or information must be signed by the attorney for the government means that a "defendant may be charged and tried for misdemeanor on an information not verified or supported by affidavit." Actually Rule 7 makes no reference to oath or affirmation, it simply covers what must be prosecuted by indictment and what may be charged by Information, and states the requirement of the signature of the attorney for the government on both. Hence, that Court's basis for dropping the need for an information to be signed under oath had no support.

The second case the Prosecuting Attorney relied upon was U.S. v.Grady, 185 F.2d 273, (7th Cir. 1950), where this was not even an issue since the case was brought before that court under a warrant issued under oath. For some reason unknown, that Court said at pg. 175:

> "...it seems plain by Rule 7(a) that an information need not be verified by affiant, and it 'may be filed without leave of the court. And by Rule 9(a), it seems equally plain that an information need be supported by an oath only when there is a request by the government attorney for the issuance of a warrant, and in the absence of such oath only a summons will issue..." (emphasis added)

Why that court saw fit to speculate (using seems) and make a distinction between a warrant and summons is a mystery. Yet, this case has been used to circumvent the clear Rules of the Court, Rules 4, 7 and 9, with Federal Common Law (case law).

As long as these rules remain in effect they must be adhered to by government actors in initiating a criminal prosecution. The "duty" created by these rules was ignored by the prosecuting attorney when he did not attest to the INFO. under oath; and the Clerk of the Dist. Ct. violated his authority by issuing a summons without such oath (specifically called for at the bottom of the Summons) [Exh. "J"], adding to the

collusion to strip away what the Constitution has guaranteed to me.

The fact that I was not duly summoned because of this defect should have been recognized as fatal to the conviction (with double jeopardy attaching) by the 10th Cir. in my appeal of the first trial [see Exh. "K"]. The defect was also brought to the attention of the Dist. Ct. in a Motion prior to the second trial. It was summarily denied. I claim these subjective decisions were made necessary because of my being denied bail pending appeal pursuant to 18 USC 3143(b) (2) and by the influence of other branches of government over the lower courts. Ex Parte Bollman, 4 Cranch 75,89-90 (1807).

VII.
INEFFECTIVE ASSISTANCE OF COUNSEL

After the experience of my first trial, where I was represented by two attorneys, I realized I could not rely on an attorney to be an advocate in a trial

under Sec. 7203. The [0th Cir.'s avoidance of the issue of ineffective counsel in my appeal was convenient for the government and my attorneys.

I claim my attorney's initial defence strategy that I stipulate to being a person required to file, that I did not file, and then be defended only on the element of willfulness was intended to make the charge valid. When I refused this advice, my lead attorney, Mr. McLarty, solicited and received the aid of the Judge to convince me his defence was better than mine [9/17/84 TT. 54]. Upon my insistence on being defended on all three elements of the alleged offence, the Judge gave her opinion that I can be defended my way. My attorneys were thus on record as not being obligated to defend as the government preferred, but as agreed upon. Mr. McLarty's comment to the Judge,

> "I didn't want you to think that I suddenly changed my stripes from the last time I was in your courtroom." [9/17/84 TT 58: 16-17],

is not the hallmark of an advocate.

Upon my attorneys insistence, I had a psychiatric evaluation that they chose not to use after the doctor's report stated my beliefs were delusionary, telling me it would be harmful. These same attorneys used the same doctor for an evaluation of a person before the same Court a few weeks before my trial [U.S. v. Phillips, supra] The Judge rejected it, saying if the doctor had said Mr. Phillips had delusionary beliefs it could be used, but not otherwise. This was the same Judge that presided in my trials, and read the doctor's report on me prior to the commencement of my first trial.

The delusionary defence did not come to my attention until recently and not through my attorneys, though they had a duty to apprise me of this defence. This omission on their part further proves their first allegiance was to the Court, when it should have been to me.

It is the duty of an attorney to perform in court as an advocate. For this his interest in the defendant must be 100%. Short of this I was a customer, not a client, and the quest of improving his credibility in the court denied me my 6th Amendment right to counsel.

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial - system to produce just results. An accused is entitled to be assisted by an attorney, ..., who plays the role necessary to ensure that the trial is fair."
> Strickland v. Washington, 104 S.Ct. 2052, 2063 (1984)

Mr. McLarty accused me of impairing his credibility with the Court when I refused to sign the PSI which wrongfully stated I evaded taxes. Such statement extends my conviction beyond the charge to a felony of tax evasion and prejudiced me by placing me in a higher category in the 28 C.F.R. Chapter 2.20 release guidelines.

In a Sec. 7203 case, reference to "tax evasion" in the PSI can only be for the

purpose of allowing abusive extension of power through administrative tactics to accomplish punishment beyond regulation guidelines, and to aid the IRS in the future with regard to a deficiency notice. Proof of intended prejudice is the exclusion of my Defendant's Statement in the PSI sent to the prison for their files (used by the Parole Board) [Exh. "L"] and goes beyond the faulty PSI.

My attorneys were ineffective and their overt act of attempting to have me validate the charge by stipulation goes to being deprived of my 6th Amendment right to counsel. Due process and my 1st Amendment right appear to also be impaired by their conduct and the the Court's control over these attorneys where this Federal Agency (the IRS) is concerned.

Had an objective review of my direct appeal been possible by the 10th Cir., ineffective assistance of counsel could have reversed my conviction, with prejudice.

VIII.

DENIAL OF BAIL PENDING APPEAL

Denial of bail pending appeal in the Dist. Ct. under 18 U.S.C. 3143(b)(2) makes the judgment of that court final and makes an appeal impossible, essentially removing the right altogether. And, if the Appellant was not duly convicted and unlawfully imprisoned (as in my case), such conditions prevent any pleading for relief in the Cir. Ct. from getting anything but a subjective review and answer. Even an acquittal is not justice once the damage is done. Hence, it sets up a condition to invite violation of due process by use of process to avoid answering substantive questions of law and fact and makes enforcement of fictional pleadings possible, especially when the false charges were initiated by a Federal Agency.

Following my first trial, the Court granted bail pending appeal on Nov. 14, 1984 and transferred me into the hands of the Executive Dept. I effectuated the appeal bond and filed my Notice of Appeal

that same day before being brought before Magistrate Schauer, whose only authority was to effectuate the court's order. Instead, upon the government's interference, he chose to have me held in the custody of the Executive branch and brought before Judge Weinshienk on Nov. 15th. The Judge chose to sentence me a second time, denying me bail and ordering my incarceration under the newly enacted 18 USC Sec. 3143(b)(2) to commence Dec. 5th., with the following justification:

> "I'm not able to say that the appeal raises a substantial question of law or fact likely to result in reversal or for an order for a new trial, because I truly do not feel that it does. I think these issues have been tried in many courts. There have been other similar cases which have gone up on appeal and which have been upheld on appeal; so there is not a substantial question." [11/15/86 T. 3: 15-21]

Here, without even asking me what my appeal issues might be, Judge Weinshienk wrote an imaginary appeal for me and answered the appeal (for the Appellate Court) in the negative, and did so in

three sentences. This was brought out in my direct appeal to the 10th Cir. Also, the reversal of that conviction and judgment proved her conclusion was not accurate.

Although a due process violation existed, the prosecuting attorney's response to this issue and to the double jeopardy caused was that it was moot since I was released on bail pending appeal after filing my direct appeal and before his answer. This goes to control of my appeal by the Justice Dept. Then the 10th Cir. opted to apply judicial gloss to the first trial by the unjust decision of reversing on a technical issue and remand for new trial, without addressing the substantive issues. Their review was subjective.

Following my second trial, Judge Weinshienk again denied me bail pending appeal under 18 USC Sec. 3143(b)(2) despite admitting (twice) at that

sentencing hearing that there is a question on jury instruction that has merit. She was reminded of this by Motion prior to trial and also was presented with some of my appeal issues in a personal letter [Exh. "M"] prior to that hearing.

The process under 18 USC Sec. 3143 now forces me to seek bail pending appeal in the Federal Appellate Court. To do so I must necessarily provide that Appellate Court with jurisdiction to hear the matter of bail pending appeal even when it is not within their jurisdiction by statute to review the subject matter of the trial record without my consent [Exh. "F"].

Though this would not be a voluntary act, it prejudices me since the IRS and the Dist. Ct. will pretend this is implied jurisdiction over the original action even though jurisdiction in the Dist. Ct. to hear the case was never stated, and when questioned never addressed. Since jurisdiction over a person as to the

subject matter in a criminal charge cannot be waived, to obtain and use implied jurisdiction in this indirect manner is an abuse of process which exploits my freedom of expression; Further, 18 USC 3143(b)(2) makes clear a decision by a higher court is applicable only after the "filing of the appeal".

Justice appears questionable in the 10th Cir. since they chose to change the intent of my Motion [Exh. "E"], and summarily denied my Motions [Exh. "E", "F"] after I had given them a full story in my Petition for Writ of Habeas Corpus [Exh. "N"].

18 USC 3143(b)(2) is bad law and unconstitutional as presently implemented, for appeal rights are now controlled at the discretion of the Dist. Ct.; allowing for punishment by charge, and not just by law, in that Court. It will encourage more bad charges, more falsehood used in trial (violative of the 6th Amendment),

and, result in more direct appeals in court's hindered from rendering just decisions because premature punishment makes after the fact justice impossible. Remedy is limited once punished and the punishment is unjust. In essence it rewrites the Constitution as to a person charged by Government Agencies, for a subjective review will undoubtedly be more preyalent when the action was initiated by such Agency. Ex Parte Bollman, supra, 89-90.

This Statute is violative of due process and the Eighth Amendment [U.S. v. Affleck, Kowalik, 765 F.2d 944, 954, dissenting opinion], and it's improper use should cause my immediate release from imprisonment pending the full decision of this Petition for Writ of Habeas Corpus.

IX.
JURISDICTION

> "...jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise."
> Reid v. U.S., 211 U.S. 529,539 (1908).

A Court has the obligation to determine, prior to trial, whether or not it has jurisdiction over the subject matter, over the person as to the subject matter, and venue jurisdiction. In no way can it be fair or maintain justice to obtain pretended after the fact, post conviction, jurisdiction by the forced act of the person charged.

Only civil jurisdiction is provided by law to the Federal District Courts over tax matters, and that is not exclusive. No statute provides jurisdiction to the Federal District Court over a criminal offence in the I.R.C. unless the subject matter of the internal revenue criminal offence also relates to a criminal offence in Title 18, Chapters 1 through 119.

Where the offence can only be brought against a specific class of persons (Special Law), as are all internal revenue offences, and the section (like Sec. 7203) ONLY covers PENALTIES for violation of a

"duty", the charge must also state the law that creates the "duty" and establishes the charged party is controlled by that "duty" thereby subjecting him to the penalty, which in turn provides jurisdiction to the court over the person as to the subject matter. This goes to subject matter jurisdiction, which cannot be waived. Acquiescence is not possible in a criminal charge brought by the U.S.

The government never attempted to state the statutory jurisdiction in it's actions against me. Even so, I challenged jurisdiction when summoned. Magistrate Abram ignored the question, entered a plea of not guilty for me, and scheduled trial.

The continuing attempts of those in the lower courts to force my acceptance of jurisdiction is clear by their conduct.

On July 15, 1986, my conviction under the first trial was reversed based on a jury instruction that I included in my brief because it was the only issue raised

by my attorneys on bail pending appeal to the en banc panel.

Upon reversal, I filed a Motion, July 28th, for release of the $20,000 held by the government in the form of an Appeal Bond along with a Motion for Release of Probation Requirement. The latter Motion was a summarily denied Aug. 19th, but the Dist. Ct. did not act on my request for the release of my property until Sept. 3rd, the day after the Mandate was filed with the Clerk of that Court.

The Order regarding release of the $20,000 called for me to execute an unsecured bond; and for ME to make arrangements to appear before Magistrate Abram, set a discovery conference, be advised about my right to have appointed counsel under Fed. R. Crim. P. 44(a), and notify Assistant U.S. Attorney O'Rourke. The Order even provided the Magistrates telephone number.

By the wording in the bond form, the

effect of my executing an unsecured bond is to agree to the trial and agree to venue jurisdiction in the Federal District Court. This I could not do unless the government established jurisdiction existed over me as to the subject matter.

Before I could make my position known to that Court, Magistrate Abram filed an unsigned MINUTE ORDER on Sept. 5th, ordering me to appear.

When my attempts to call attention to the error of retrial were unsuccessful (including a Petition for Writ of Habeas Corpus in Dist. Ct.) I decided to make a special appearance before Magistrate Abram on Sept. 19th, 1986, limiting it strictly to the issue of jurisdiction and not allowing the question of the execution of the unsecured bond to become part of the hearing. After threat of contempt of court, Magistrate Abram responded to my question of his jurisdiction by saying it was derived from Judge Weinshienk's

Order. I then brought to his attention the fact that if the Dist. Ct. lacks jurisdiction over me as to the subject matter, Judge Weinshienk's Order had no legal effect. With this, he terminated the hearing and sent me home, without answering the jurisdiction question. He followed up with an ORDER filed Sept. 29, 1986 that contained the inaccurate comment that I "refused to sign the appearance bond", when I merely refused to bring that issue into the hearing since that would transform it from a special hearing to a general hearing, and my jurisdictional question would be waived. I filed my response October 8th stating it was not to disturb the Special Appearance I made and correcting the inaccuracy.

His Order also RECOMMENDED that there issue an order to show cause why I should not be held in contempt for violating a lawful order of the Court. To this I sent a personal letter to Judge Weinshienk,

Oct. 14, 1986, outlining the history of recent actions, and pointing out that Magistrate Abram's recommendation was addressed to the Asst. U.S. Atty., the Probation Dept. and myself, none of whom could order I be cited for contempt. This all goes to prove the intent to use this ORDER as duress to compel my performance, and obtain my implied acceptance of jurisdiction.

I further stated my position in a second personal letter to Judge Weinshienk dated Oct. 20, 1986 which was ready for mailing when I received an unsigned MINUTE ORDER from her office, filed Oct. 16th, ordering a status conference. I responded to this with a PS on my letter.

Judge Weinshienk replied to my first letter of Oct. 14th by letter Oct. 21st, which stated the U.S. Dist. Ct. does have jurisdiction without identifying how it was derived; that the case will go to trial on Nov. 3rd; that failure to appear

for the status conference or the trial would result in a bench warrant for my arrest; that the $20,000 bond would be released "if and when" I signed the unsecured bond; and that any questions I have concerning jurisdiction of this Court should be addressed to an attorney.

Since jurisdiction in Federal Courts must stem from authority given to them by Congress it should be a simple matter to state*. The repeated refusal to so state by all those in the lower courts can only be construed as their lack of jurisdiction over me as to the subject matter; and the flagrant attempt to have me provide pretended jurisdiction to them was to control my conduct against my will.

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* ..it is a fundamental doctrine, in respect to the federal courts in inferior jurisdiction ... To enable them to exercise the functions bestowed by the constitution over crimes and misdemeanors, <u>there must be a designation, by positive law, both of the offence and of the tribunal which shall take cognizance of it.</u> <u>U.S. v. Wilson</u>, 3 Blatchf. 435 (1856)

I did not appear for the status conference in order to make firm the fact that I was not voluntarily submitting to another trial or voluntarily conferring any jurisdiction to the court. But, after two telephone calls received by my wife from Judge Weinshienk's office I agreed to a conference by telephone as offered in the Court's Minute Order. Before the call arranged for could be accomplished, I was arrested and transported to Denver for trial. Under duress, I executed the bond, since I was promised I would stay in city jail and come out only for trial; making it impossible to prepare any kind of a defence.

At sentencing Judge Weinshienk confiscated my $20,000 Appeal Bond as punishment for not making the appearance. The Court did not forewarn me of such a possible action. No hearing was conducted on the matter of making my $20,000 an

appearance bond, nor was there a hearing on the taking of my $20,000. Also, the prosecuting attorney, representing the government's position, did not ask that the monies be confiscated.

All of the lower court's actions reflect their continuing duress of my person and my property in order to have me provide jurisdiction. The government action will have me abide by their will at the cost of my liberty, my property, and my civil and constitutional rights.

Without jurisdiction in the Dist. Ct. to hear the case, I was forced to be subjected to the cruel trilemma of self-accusation, perjury, and contempt in an inquisitional prosecution, not the accusatory process which is supposed to be the standard; making it a trial by ordeal.

The Dist. Ct. lacked jurisdiction over me as to the subject matter, and all orders and judgments emanating from that court are void for that reason.

CONCLUSION

A charge that did not establish I was a "person" subject to the "duty" put forth in Sec. 7203 and so could be punished pursuant to it, did not offer probable cause for the trial, nor did it confer jurisdiction to the court over me as to the subject matter. Also, a comparison of my conduct to my conduct in trial was insufficient to sustain a verdict.

The lower Courts had an obligation to recognize these insufficiencies and terminate the trial, but chose to act in collusion with other government actors to aid in the enforcement of an indirect tax outside the lawful reach of the IRS.

This is a country of laws, not of men. A law that mandates relinquishment of rights would be void. Yet, here we have a group of government actors ignoring law in order to procure a right to property not lawfully within their reach, and willing to abuse process and abrogate

constitutional rights to aid the IRS in acting outside it's de jure authority. All government actors were guilty of conducting a collusive action and using a jury as a tool of enforcement to promote undue influence of the IRS by having me involuntarily serve the IRS as an example to deter citizens from exercising their inalienable rights.

> "What the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary, nor all three in concert, may strip away." Nishikawa v. Dulles, 356 U.S. 129, 138 (1957)

Government actors, by not meeting their duty to act independently of the influence of the Executive Department of Government, cause duress of person, duress of property, and duress of imprisonment through abuse of process for unlawful purpose. Their conduct reflected contempt of court and violated my civil rights.

Sec. 7203 is not unconstitutional as long as it's application is restricted to

a person under a "duty", who is not relinquishing rights in the process of making returns. But, Court action such as mine is enforcement of income tax that affects matters of substance and goes to the Brushaber Court's qualification of the classification of the tax.

The government actors knowledge that this was a fictional action from it's inception, and lacked due process, meant I could not be duly convicted by any jury. Under these circumstances, my imprisonment is cruel and unusual punishment as well as involuntary servitude.

The Dist. Ct. assured me of continuing duress when it said I could expect to hear from the IRS after being released from prison [12/8/86 T p. 15: 23-25] Any subsequent action on the part of the IRS or the government to force me into liability in debt without a specific law that creates a duty upon a particular property would violate the 1st and 13th

Amendments.

Speed is of the essence. Every minute I am unlawfully held as a prisoner is to reduce justice to a fiction.

I pray this Court will recognize the fact that I was not duly convicted and take the bold move to effectuate my immediate release by finding the deprivation of my civil rights and matters of law sufficiently presented to make a unilateral and swift determination to render justice and fairness by vacating the sentence and restoring me to my previous status; including but not limited to release from imprisonment, return of confiscated property, any other appropriate compensation for being falsely imprisoned, and an injunction against any further IRS harassment of me and my wife.

If not, I pray this Court will call upon any one or all of the government actors to answer for their actions in this case and show cause why I should not be

released immediately with the relief stated above.

I further pray this Court will deny any request for extension of time made by the government since these issues have been before them for two years with no proper response.

Respectfully submitted,
FRANK KOWALIK, JR., #18636
F.C.I. Camp
P.O. Box #500
El Reno, OK. 73036

Karen Kowalik

BY: Karen Kowalik
4711 N. Portland Aye.
Oklahoma City, OK. 73112
(405) 947-8280

AUTHORIZATION

I, KAREN KOWALIK, hereby state that I am acting in behalf of my husband, FRANK KOWALIK, JR., as authorized by him under the authority of 28 USC Sec. 2242, in submitting this Petition for Writ of Habeas Corpus. I do so for the following reasons:

A. The El Reno Federal Correctional Institution Camp "visiting regulations" forbid under:

> No. 7. ...NO WRITTEN MESSAGES MAY BE EXCHANGED. DOCUMENTS OR PAPERS CANNOT BE HANDLED OR SIGNED.
> No. 9. IT IS ILLEGAL TO INTRODUCE INTO THE INSTITUTION OR TAKE ANYTHING WHATSOEVER FROM ANY FEDERAL PENAL INSTITUTION WITHOUT THE CONSENT OF THE WARDEN OR HIS REPRESENTATIVE. THE PENALTY FOR VIOLATION IS TEN YEARS, $10,000 FINE, OR BOTH.

B. Since Frank is a pro se and I act as his secretary, he requested permission for us to exchange papers in order to coordinate the completion of this petition. His request was denied, severely impairing Frank's right to this appeal. Fortunately, most of it was organized prior to his incarceration and he brought a copy with him to work from

when he entered the camp.

C. Though the threat under No. 9. is vague (no specific law authorizing the fine and the violation - stating 10 years - merely implying imprisonment), Frank's approach to them for relief has already caused them to treat him with disfavor, making Frank's existence there excessively uncomfortable.

TO AVOID ANY VIOLATION THAT MIGHT PLACE EITHER ONE OF US IN JEOPARDY, I HEREBY ACT IN BEHALF OF FRANK KOWALIK, JR. #18636-013, F.C.I. Camp, Box 1500, El Reno, OK. 73036.

CERTIFICATE

KAREN KOWALIK, being first sworn under oath, presents that she has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of her knowledge and belief.

Respectfully submitted,

(signature)

Karen Kowalik, in behalf of
FRANK KOWALIK, JR.
4711 N. Portland Ave.
Oklahoma City, OK. 73112

SUBSCRIBED and SWORN before me this 20th day of February, 1987.

/s/Toni Bacus

Notary Public

My commission expires 11/9/87

APPENDIX

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 84-CR-193

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KOWALIK, JR.,
Defendant.

INFORMATION
26 U.S.C. Sec. 7203

COUNT I

The United States Attorney charges;

That during the calendar year 1978, FRANK KOWALIK, JR., who was a resident of Englewood, in the State and District of Colorado, received a gross income of approximately $106,548; that by reason of such income he was required by law, following the close of calendar year 1978 and on or before April 15, 1979, to make an income tax return to the district director of Internal Revenue for the Internal Revenue District of Colorado at

Denver, in the State and District of Colorado, or to the director of the Internal Revenue Service Center in Ogden, Utah, stating specifically the items of his gross income and any deductions and credits to which he was entitled; and that knowing the foregoing facts, he willfully and knowingly failed to make said income tax return to said district director, said director of Internal Revenue Service Center or any other proper officer of the United States.

The foregoing was in violation of Title 26, United States Code, Section 7203.

COUNT II

The United States Attorney further charges:

That during the calendar year 1979, FRANK KOWALIK, JR., who was a resident of Englewood, in the State and District of Colorado, received a gross income of approximately $154,550; that by reason of

such income he was required by law, following the close of calendar year 1979 and on or before April 15, 1980, to make an income tax return to the district director of Internal Revenue for the Internal Revenue District of Colorado at Denver, in the State and District of Colorado, or to the director of the Internal Revenue Service Center in Ogden, Utah, stating specifically the items of his gross income and any deductions and credits to which he was entitled; and that knowing the foregoing facts, he willfully and knowingly failed to make said income tax return to said district director, said director of Internal Revenue Service Center or any other proper officer of the United States.

The foregoing was in violation of Title 26, United States Code, Section 7203.

Respectfully submitted,
ROBERT N. MILLER
United States Attorney
(signature)
BY: THOMAS M. O'ROURKE
Assistant U.S. Attorney

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA)
Plaintiff-Appellee,)
) No. 84-2600
v.)(D.C. 84-CR-193)
)(Dist. of Colo.)
FRANK KOWALIK, JR.)
Defendant-Appellant.)

- - - - - - - - - - - - - - -

ORDER AND JUDGMENT

- - - - - - - - - - - - - - -

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

- - - - - - - - - - - - - - -

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 10(e). The cause is therefore submitted without oral argument.

In this matter we need to consider only Mr. Kowalik's allegation that the trial judge's "objectively reasonable"

jury instruction warrants reversal of his conviction. In view of our recent decision in United States v. Phillips, 775 F.2d 262 (10th Cir. 1985), we must reverse the district court's judgment and remand this case for a new trial. See also United States v. Harrold, No. 84-2612, Slip Op. (10th Cir. July 14, 1986).

(signature)

ROBERT L. HOECKER, Clerk

U. S. Court of appeals

STAMPED: FILED July 15, 1986

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STAMPED FILED JULY 28, 1986

UNITED STATED OF AMERICA Plaintiff-Appellee	)
	) No. 84-2600
v.	)(D.C.84-CR-193)
	)(Dist. of Co.)
FRANK KOWALIK, JR. Defendant-Appellant	)

PETITION FOR REHEARING
with Suggestion for Rehearing en banc

COMES NOT, FRANK KOWALIK, JR., Defendant-Appellant, pro se, seeking a rehearing en banc of my appeal as the Order and Judgment (copy attached) rendered by the three-judge panel is inappropriate, inadequate, and unjust under the circumstances. (28 U.S.C. Sec. 2106)

Under the circumstances of this case, the remand for new trial is not appropriate as it is in essence a remand for retrial of the same offense. My appeal apprised the three-judge panel that

I had already served prison time under the Judgment of the District Court when bail pending appeal was denied at my second sentencing. Hence, the Appellate Courts power to remand for new trial is nullified under the double jeopardy doctrine. This left them only open to reverse, with prejudice, without remand for new trial (32 Am. Jur. 2d Sec. 420). However, this alone is insufficient to render true relief and justice as reversal was based on a lesser issue in the appeal.

It may have been expedient, under pressure of time, for the three-judge panel to render their decision based on one single technical issue presented on appeal, but it is inadequate to order a new trial in a court where jurisdiction was questioned and left unanswered. Avoiding the constitutional and jurisdictional questions in my appeal does not resolve the real and substantial controversies of the parties (32 Am. Jur.

2d Sec. - 331). This use of process would create a condition where all issues presented will become moot and force me into the legal position of relinquishing certain First Amendment rights, thereby compounding the miscarriage of justice already prevalent in this case.

In the interest of justice, and to reduce abuse of process, I hereby request an en banc panel of this Court to review and answer all of the real and substantial questions in my entire appeal, thereby deterring rather than condoning the use of process to initiate malicious prosecution by government agencies.

Respectfully submitted this 24 day of July, 1986.

(signature)
Frank Kowalik, Jr., pro se
4711 N. Portland
Oklahoma City, OK. 73112
(405) 947-8280

CERTIFICATE OF SERVICE dated July 24, 1986, signed by Karen Kowalik and mailed to: Zita Weinshienk, Judge District Court; and Robert N. Miller, U.S. Atty. & Thomas M. O'Rourke, Asst.U.S.Atty., Denver, Co.

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

84-CR-193

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK KOWALIK, JR.
Defendant.

MOTION TO DISMISS WITH PREJUDICE

I, FRANK KOWALIK, JR., named defendant pro se, pursuant to Rule 12(b)(2), Fed. Rules Cr. Proc., hereby ask that this case be dismissed with prejudice based upon the insufficiency of the charge.

The original charge by Information in Criminal Case No 84-CR-193 filed June 29, 1984 in the District Court of Colorado, has not been revised and is the basis for the second trial scheduled to commence Nov. 3, 1986. I object to it's inadequate statement of the alleged violation. The only Statute cited in the Information is 26 U.S.C. Sec. 7203, which merely prescribes

punishment for violation of the laws under which it falls. The charge by Information makes a vague statement that "he was required by law" without stating the specific law alleged to have been violated that references section 7203 as the punishment.

Since there are no common law crimes against the United States Government, U.S. v. Eaton, 144 U.S. 677, 687, the crime must be stated in law and done so clearly. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Champlin Rfg. co. v. Commission, 286 U.S. 210, 242, 243. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play

and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385,391.

26 U.S.C. Sec. 7203 Uses the term "any person required" without reference to the Public Law or statute that establishes a requirement upon me to make a return taxing directly the property I received in exchange for my service in the private sector. The taxing of Federal government employees salaries and pay (12 Stat. 473, Sec. 86), passed by Congress in 1862 is explicit and clear, and it was placed under income tax in 1864 with the passage of 13 Stat. 281, Sec. 117. I believe Congress had the power to alter the employment agreement made with their own employees, but it does not have the power to interfere

with employment contracts in the private sector, nor does it have the power to place a direct tax on my property without the requirement of apportionment being applied. Only I can tax my property directly by filing a return on a totally voluntary basis.

If the prosecuting attorney is not able to make the charge sufficient by providing a Public Law passed by Congress that mandates me to waive my Fourth Amendment right to privacy of my papers and things by requiring me to file returns disclosing my personal business to the IRS, Boyd v. U.S., infra; a Public law passed by Congress that mandates I waive my Fifth Amendment right not to be a witness against myself by requiring me to disclose my personal and private business in a return to the IRS, Garner v. U.S., 424 U.S. 648 (1976); and a Public Law passed by Congress that forces me to relinquish my First Amendment right to choose whether to waive my Fourth and

Fifth Amendment rights by providing criminal punishment for non-compliance with such laws; it is admission that such laws do not exist. As the Supreme Court stated in Boyd v. U.S., 116 U.S. 616, 627 (1886), "If it is law, it will be found in our books; if it is not to be found there, it is not law."

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." See Stromberg v. California, 283 U.S. 359, 368; Lovell v. Griffin, 303 U.S. 444. Without being furnished the Public Laws that places the "duty" upon my conduct, I cannot adequately defend myself and a fair trial is impossible. Also, without stating such laws, I am placed in the untenable position of having to prove I am innocent of no violation of a crime of record.

In my first trial the standard used was a comparison of my present conduct to my

former conduct, thereby allowing the prejudicial presumption that because I filed tax returns in the past that a law exists that required me to do so. As Honorable Judge Weinshienk said in the jury instructions in my first trial, "never is a defendant to be convicted on mere suspicion or conjecture" (T. 465: 22-23) If the court feels this is truly so then the prosecuting attorney should be instructed to state the Public Laws that clearly place the "duty" upon me to declare my personal property is income for income tax purposes, and punishes criminally for non-compliance, or admit they do not exist.

I am not saying that laws do not exist to which 26 U.S.C. 7203 can be applied, or that it cannot be validly enforced upon a proper party, but the "person" to whom section 7203 can be applied is specifically defined in section 7343 as someone "under a duty to perform the act in respect of which the violation occurs." I am simply asking

that I be supplied with the LAW that creates the "duty" upon ME, thereby placing my conduct under the punishment of section 7203.

Apparently Judge Weinshienk recognized that I was not a person under a "duty" that could be criminally charged with violating 26 U.S.C. 7203 since she stated in chambers prior to my first trial,:

> "I don't think there is any way that I'm not going to be instructing as a matter of law that he has the duty or the -- I won't say has the duty, because I can't say that in a criminal case."
> (T. 59: 12-15) (emphasis added)

To allow this case to go to trial without my being cognizant of the precise and explicit charges against me is an injustice and violative of due process, since a defense is not possible without clearly knowing the LAW that charges me with the "duty" to conduct myself in a particular manner. And, if such a "duty" exists in positive law, and is provided to me, I would acquiesce to it and a trial

would not be necessary.

I pray this Court will recognize the insufficiency of the accusations made by the prosecuting attorney, my right to be made fully aware of the charge and the governments obligation to provide this information. If he is not able to supply the Public Laws upon which my conduct is to be compared, which is essential to prove specific intent, this case should be dismissed with prejudice.

Dated: Nov. 3, 1986

Respectfully submitted,

(signature)

Frank Kowalik, Jr., pro se
4711 N. Portland Ave.
Oklahoma City, OK. 73112
(405) 947-8280

CERTIFICATE OF SERVICE

Copies delivered in person prior to the conference scheduled Nov. 3, 1986 to:

Zita L. Weinshienk, Judge U.S. Dist. Ct.

Robert N. Miller, U.S. Attorney
Thomas M. O'Rourke, Asst. U.S. Atty.

EXHIBIT "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.) No. 86-2814
)(D.C. 84-CR-193)
FRANK KOWALIK, JR.)
Defendant-Appellant)
)

MOTION FOR STAY OF SURRENDER

COMES NOW, FRANK KOWALIK, JR., pro se, seeking a stay of surrender, ordered at the sentencing hearing held December 8, 1986 and entered in the Judgment Order of the District Court dated December 12, 1986 (Exhibit A), pending the determination of my Motion to this Court for Bail Pending Appeal under the Procedures for Review of Orders Respecting Release adopted September 11, 1985. Bail pending appeal was denied by the District Court under 18 U.S.C. 3143(b)(2), and incarceration is scheduled to commence December 29, 1986, making time of the essence.

STATEMENT OF FACTS

On December 8, 1986, I was sentenced to a period of incarceration following a retrial of this case. A Notice of Appeal was filed that same day (Exhibit B). The delay in filing this Motion was caused by the unavailability of number assignment until the Judgment Order was submitted by the District Court, which occurred December 12, 1986. I have already been incarcerated approximately seven months under the Judgment of the first trial of this case, September 17-19, 1984, as a result of being denied Bail Pending Appeal under 18 U.S.C. 3143(b)(2). That issue was addressed en banc in the Tenth Circuit (No. 84-2600) and resulted in the granting of Bail Pending Appeal on June 28, 1985. A Judgment on the Direct Appeal (No. 84-2600) filed July 15, 1986 (Exhibit C) ordered reversal of the conviction and judgment based upon a jury instruction, allowing remand for new trial even though

substantive issues were not addressed by the three-judge panel. The second trial commenced Monday November 3, 1986 with all of my Motions submitted prior to trial being summarily denied. A jury brought in a verdict of guilty on November 5, 1986.

At the sentencing hearing, December 8, 1986, Bail Pending Appeal was again denied based upon 18 U.S.C. 3143(b)(2). Transcript of the sentencing hearing has been ordered and is expected to be available early in January. Quick delivery was requested but not possible due to a special case taking up the court reporters time.

An unsecured $5,000 Appearance Bond is in effect pending submission to incarceration scheduled December 29, 1986. A Motion to the District Court requesting revocation of the incarceration order and grant of bail pending appeal has been filed, but prudence dictates the need for this Courts consideration of a stay my incarceration.

A Motion for Bail Pending Appeal will be presented pro se to the Tenth Circuit under Fed. R. App. P. 9(b) as found under this Court's Section II. A. in ADOPTION OF PROCEDURES FOR REVIEW OF ORDERS RESPECTING RELEASE, adopted September 11, 1985.

ARGUMENT

Under the time scheduling put forth in the Tenth Circuit's procedure respecting release, the District Court's temporary stay of execution of that Court's decision (due to expire December 29, 1986) is insufficient to effectuate completion, submission, and determination of a Motion for Bail Pending Appeal.

I have presented a Motion to the District Court for Written findings and conclusions on it's determination under 18 U.S.C. 3143(b). Awaiting response to that Motion I will now state that the District Court, at the sentencing hearing held December 5, 1986, concluded pursuant to 3143(b)(1) that I do not pose a danger to

the community nor will I flee; and pursuant to 3143(b)(2) that no matter of law or fact likely to result in reversal or a new trial was present in this case. However, that Court qualified it's determination by twice stating that a jury instruction was questionable. This in itself should have been sufficient reason to grant Bail Pending Appeal. It appears Justice Douglas feels much the same when he said in Herzog v. U.S., 99 L. Ed. 1299 1301 (1955) (Douglas, J., in Chambers):

> "The first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail. Though there were only one likely protagonist of that view on the Court, I would feel that the question should be saved for decision by the entire bench. The fact that one judge would be likely to see merit in the contention is likewise enough to indicate its substantiality. There is room or argument on many rules of law and on most of their applications. The shadow of a doubt across one's own conclusion is itself sufficient, at

least where bail is involved. Bail is basic to our system of law."

The denial of bail demonstrates the untenable position the District Court is placed in by accepting the responsibility of making a determination under 18 U.S.C. 3143(b)(2). Acknowledgment by that Court that trial error was sufficient to reverse a conviction, whether it be based upon law or fact, would require that Court to declare a new trial was needed to achieve justice and not even allow the case to go to the appellate level. With this in mind, the language of the statute makes clear the intent of Congress. 3143(b)(2) reads:

> Release on detention pending appeal by the defendant. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds -
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial. (emphasis added)

Congress specifically phrased 3143(b) for a person "who has filed an appeal or a petition for a writ of certiorari", NOT who has filed a Notice of Appeal or merely said he would appeal, indicating it is the actual filing of the appeal that triggers the determination and not just a presumption that exists at the sentencing phase of the trial. The fact that all of the issues are not available to the defendant at that proceeding makes such a determination lacking in due process at that time, which in itself is error.

By the wording of 18 U.S.C. 3143(b)(2) it appears that Congress intended to give the Appellate Court a tool to control frivolous appeals, not appeal rights, and still keep within the bounds of due process. This concept is affirmed by the changes made by Congress in 18 U.S.C. 3141 on Oct. 12, 1984 when "or a judicial officer of a Federal appellate court," was added, expanding the previous restriction

that the determination of bail be made by a judge or magistrate at the lower level.

Also, the Tenth Circuit seems to have recognized the fact that Congress did not intend for the defendant to prejudice himself by informing the prosecuting attorney in advance of appeal as to the questions on appeal when they aided due process to some degree by the new rules providing for the filing of Memorandum briefs on the appeal or motion regarding the issue of bail pending appeal to be done simultaneously. However, if the appellant is already incarcerated under the conviction before allowed to be heard on his "mini appeal" due process would again suffer.

Incarceration based upon frivolous presumption that no appealable issues are present in the case, by a court that obviously could not objectively make such a determination and still allow it to go to appeal, is an unjust deprivation of

life and liberty and a violation of appeal rights. This is especially true in this case when the District Court has already admitted jury instruction error is present.

I have already served about seven months in prison as a result of being denied bail pending appeal after my first trial when the District Court felt I had no appealable issues that would prevail, yet the reversal of that conviction proved the contrary. This time the District Court acknowledged that there is a questionable jury instruction and indicated a true concern by mentioning it twice during the sentencing hearing, and still I was denied bail pending pending appeal. Such a cursory decision on appeal issues at the District Court level is tantamount to allowing the District Court to function as the Appellate Court, (a function not contemplated in law). This constitutes an abuse of power that denies

me all appeal rights if an issue reverses the conviction after serving full time under the judgment.

I feel not only the jury instruction the Court was concerned with will prevail on appeal, but that I can argue conclusively that there was an insufficiency of evidence in this case as well as constitutional deficiency.

Justice is not hampered, it is enhanced, by a temporary delay in my incarceration since it causes no harm to the government. Yet, to deny me my liberty prior to the Appellate Courts review of the issues would cause irreparable harm to me. As noted in Thompson v. U.S., 452 F.2d 1333, 1340 (D.C. Cir. 1971), "The harm done to an innocent defendant who 'serves time' before his conviction is reversed on appeal cannot be undone and serves as a continuing affront to our sense of justice."

In my letter to Judge Weinshienk (Exhibit D)(not included in the attachments to the Asst. U.S. Attorney in order to avoid revealing issues in advance of the time prescribed in the Tenth Circuit's new rules), I provided some of the issues to be raised on appeal and revealed some of my studies on income tax, which has been extensive. My actions and reactions in this case were not done frivolously in an attempt to avoid any duty imposed by positive law. In fact, I have repeatedly indicated that if the government produces the law that places me under the criminal sanctions of 26 USC 7203, my position would reverse, but as yet I have received no response except the same vague statement "required by law". Nothing clear, direct or positive.

Even if the presentation of the issues as a pro se did not contain the legal language and phrases popular in the courts I feel the arguments were clear and the

questions valid. Under the circumstances of this case, to inflict additional punishment before a final adjudication by the Appellate Court would be unjust. Tenth Circuit Judge McKay, in the dissenting opinion of my en banc appeal on the Bail Pending Appeal issue at page 4, concurs by quoting from 53 U.S.L.W. at 4106:

> "The state was thus found to have 'made the appeal the final step in the adjudication of guilt or innocence of the individual.'" Id. Accordingly, in a system where a defendant has an appeal as of right, his guilt or innocence is not finally determined until the conclusion of his appeal."

And continues at page 5 with:

> "As the Supreme Court has stated, '[p]resent federal law has made an appeal from a district court's judgment of conviction in a criminal case what is, in effect, a matter of right.' (Coppedge v. United States, 369 U.S. 438, 441 (1962) (citing 28 U.S.C. Sections 1291,1294; Fed. R. Crim P. 37(a)). The federal courts have, therefore, made the appeal 'the final step in the adjudication of guilt or innocence' and, under Everitts, the full panoply of constitutional rights applies until the conclusion of the appeal."

Therefore, would it not be incumbent upon this Court to review the issues and the possible error admitted by the Court below before incarceration under this conviction?

Furthermore, the guidelines for parole, 28 C.F.R. 2.20, are being overstepped by the Justice Dept. because of reference in the Presentence Investigation Report (PSI) to "tax evasion" when a conviction was not obtained under such a charge. For this reason I attached a statement (Exhibit E) to the PSI report explaining why I would not sign the "Notice" (Exhibit F) that accompanied it. The use of the varying severity of the offense of "tax evasion" (a felony under 26 USC 7201) by the Justice Dept. can hardly be sustained for a misdemeanor charge under "willful failure to make returns" (26 USC 7203) when put to the test. Without belaboring the subject at this time, I will merely

say I can make a strong argument that the use of Chapter 5 in place of Chapter 12 for a parole guideline under 28 C.F.R. 2.20 is an abuse that constitutes excessive punishment. For your information, in 1984 the guidelines under Chapter 12 called for time served under a two year sentence to be up to six months. This has been changed to up to four months. Hence, to avoid the additional abuse of excessive punishment (having already served almost seven months, which is greater than the guidelines call for) it might be appropriate to order the judgment be changed to time served, or at least order a stay until a final adjudication of my appeal.

CONCLUSION

I pray this Court will act on this Motion before December 29th (the scheduled day for incarceration and grant a Stay of Surrender, ordered at the sentencing hearing December 8, 1986 and under the

Judgment entered December 12, 1986 in the District Court, until this Courts has made a determination on my Motion on Bail Pending Appeal or a finding under the Direct Appeal.

Dated Dec. 16, 1986.

Respectfully Submitted,

(signature)

Frank Kowalik, Pro se
4711 N. Portland Ave.
Oklahoma City, OK. 73112
(405) 947-8280

CERTIFICATE OF SERVICE

I certify that a copy of the above document was mailed, postage prepaid on December 16, 1986 to:

Thomas M. O'Rourke
Assistant U.S. Atty
1200 Federal Bldg.
1961 Stout Street
Denver, Colorado 80294

EXHIBIT "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EX PARTE FRANK KOWALIK, JR. No. 86-2814
(D.C. 84-CR-193)

MOTION FOR DEFINITE STATEMENT OF
JURISDICTION AND STAY OF INCARCERATION

I, FRANK KOWALIK, JR. pro se, Defendant in D.C. action 84-CR-193, hereby ask this Court for a statement or claim of statutory authority and proof whereby this Court would have jurisdiction to hear the appeal of the reviewable decision rendered in the District Court under 84-CR-193 absent the jurisdiction being conferred by myself, and also a statement or claim of statutory authority under which the District Court conducted the trials for the alleged violation of 26 USC 7203 without a link to the statute that provides the duty and without establishing that the accused is a person under a duty,

as defined in 26 USC 1343. My need for this information stems from the following:

The procedural documents I received from the Appellate Court regarding an appeal asked that I cite the statutory authority I believe confers jurisdiction to that Court. Unable to find such authority, I decided to call Mr. Szekely, the District Court's appointed advisory counsel, and ask him where jurisdiction lies. I did so on Dec. 18th, and he informed me that jurisdiction in the Appellate Court lies in 28 USC 1291. A study of section 1291 reveals that it limits Federal Appellate jurisdiction to sections 1292(c) and (d) and 1295 (see attached). Section 1292(c) gives the Federal Appellate Court exclusive jurisdiction in Interlocutory decisions in civil actions for patent infringement or if jurisdiction of an appeal is under section 1295 of Title 28; 1292(d) covers International Trade and U.S. Court of

Claims; and section 1295 grants exclusive jurisdiction in (a)(1) if jurisdiction of the District Court was based in whole or in part on section 1338 (Patents, plant variety protection, copyrights, trade-marks, and unfair competition), and in (a)(2) if jurisdiction of the District Court was based in whole or in part on section 1346 (United States as Defendant - "except when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294.") As is readily seen, none of these covers the conviction and judgment resulting from my trial. Furthermore, it proves Congress did not intend IRS litigation to be handled on appeal in Federal Courts. This makes sense since a natural bias must be recognized when the Court and a party to the litigation are paid by the same paymaster.

I grant you, Congress left it open to the Court to accept jurisdiction over a reviewable decision from the District Court if a defendant voluntarily asked for such review, but appears to lack statutory authority to act in a case involving internal revenue absent the defendants statement conferring jurisdiction so that the Appellate Court can accept it. This concept was confirmed when I received a telephone call from the Clerk in the Appellate Court stating that he could not pass along the Motion for a stay of incarceration I submitted to them until I filed my Motion for Bail Pending Appeal, which needs a jurisdictional claim made by me in the docketing statement.

My dilemma is this, after my first trial in 1984 the docketing statement and other documents to initiate an appeal were processed by my attorney without my knowledge that the Federal Court of Appeals might not be the proper Court to

bring the reviewable decision of a District Court. Upon being denied bail pending appeal under 18 USC 3143(b)(2), I allowed my attorney to appeal that issue en banc (84-2600), but handled the direct appeal myself (84-2600). The en banc panel required the District Court to hold a hearing, which resulted in my release from prison after approximately seven months of incarceration. My direct appeal presented questions of law and fact, including jurisdiction, that were not addressed by the three-judge panel who chose to reverse the conviction and judgment based upon a jury instruction so that remand for a new trial was possible, thereby depriving me of any claim of double jeopardy in the first trial.

The record of my case proves I never accepted jurisdiction voluntarily and that my queries as to the jurisdiction of the District Court in this case have been repeatedly ignored or avoided by all

government entities. To list a few, I have asked it of the IRS; I asked it by letter upon receipt of the summons to appear in answer to the charge in 1984, as well as questioning jurisdiction at the appearance; I stated the prosecuting attorney's failure to provide a claim of jurisdiction in my Appellant's Answer to Second Brief of Appellee (under Statement of the Case); and I asked it in the many pleadings prior to my second trial (including a special appearance before Magistrate Abram). Since jurisdiction in Federal Courts must be conferred by Congress, it should be clearly stated in statute and an easy matter to dispose of when questioned, unless the intent is to force jurisdiction upon the defendant for an improper purpose by applying a criminal statute beyond it's intended use and prosecuting. There is either lawful jurisdiction or the entire action constitutes duress for unlawful purpose as

stated in Heider v. Unicume, 20 P.(2d) 384, 385 (1933):

> "To constitute duress by a threat of imprisonment for a supposed crime, there must be ... a resort to a criminal prosecution for an improper purpose or from a wrongful motive, accompanied by such circumstances as would indicate a prompt or immediate execution of the threat."

The threat has been carried out since I was in prison for approximately seven months.

The unlawful purpose was:

(1) to compel me to create liability in favor of the IRS through the vehicle of making a return, and

(2) failing this, they presume compulsion and act upon same.

The wrongful motive was:

(1) to have me serve the IRS as an example to deter the balance of society from doing the same thing, and

(2) to punish me for not expressing the will of the IRS.

It is evident and clear that 28 USC 1291 does not confer jurisdiction to the Federal Appellate Court to address a reviewable decision of the District Court

in this case unless I voluntarily confer and consent to such jurisdiction. I am entitled to know what I give up if I confer jurisdiction to this Court so that I can make an informed decision, thereby guaranteeing free agency and not impairing my free will. The government (the charging party) owes me that. Therefore, I ask this Court to state what other Court of Appeals (referred to in 28 USC 1291) is available to me to have the reviewable decision of the District Court considered, and also answer the question of original jurisdiction.

With no claim of jurisdiction in the District Court by the prosecuting attorney in the first trial, and the District Court's statement that jurisdiction to conduct the second trial stemmed from the remand of the case by the Appellate Court. One ultimate question now becomes, did the Appellate Court have power to remand without addressing the question of

original jurisdiction in the District Court presented to them in my appeal? Could the jurisdiction conferred to the Appellate Court through my attorneys by their application for appeal to that Court be considered a valid "voluntary" act by myself when I was unaware of the facts and consequences? According to Miranda v. Arizona, 384 U.S. 436 (1965), a voluntary act requires full knowledge before the acceptance of any legal consequences and waiver of any defence is valid. With this standard, my appearance to answer the summons in 1984 was not voluntary; my submission to the first trial was not voluntary; transference of any jurisdiction to the Appellate Court via my appeal was not voluntary; and the record conclusively proves my submission to a second trial was not voluntary. Hence, any jurisdiction presumed to have been given the Courts through my actions is a nullity.

However, now that I am aware that jurisdiction in the Appellate Court must be voluntarily conferred by me, I am fearful that to proceed and request the Tenth Circuit to review the issues in dispute in my second trial would imply I acknowledge jurisdiction was in the District Court over this case, notwithstanding the fact that:

(1) I made a record that I was not the person defined in 26 USC 7343 and therefore could not be duly convicted under 26 USC 7203 since jurisdiction over myself as to the subject matter could not be waived.

(2) I made a record that I did not agree to venue jurisdiction in U.S. territory, since I was forced to stand trial.

(3) I made a special appearance before Magistrate Abram, as well as presented numerous other pleadings to the Court on the question of jurisdiction in the District Court. With no Public Law made part of the record of this case to establish jurisdiction via a "duty" upon me, a special appearance was in order.

(4) That I never received an answer from any government entity as to where such authority was derived.

FURTHERMORE, LET IT BE KNOWN THAT I

NOW AND HEREBY EXERCISE MY FIRST AMENDMENT RIGHT TO RESCIND ANY JURISDICTION DIRECTLY OR INDIRECTLY CONFERRED BY MY FORMER ATTORNEY TO THIS COURT through the appeal of my first trial, such rescission being valid by virtue of the fact that it was an act done without my full knowledge, understanding, or consent.

I now ask this Court, pursuant to 28 USC 1291, where is the Courts of appeals that has jurisdiction to hear and answer the dispute between the Federal government and myself in the matter of liability, and liability is the ultimate issue?

I further ask, if I petition this court to review my appeal on the reviewable decision of the District Court on the subject case, do I prejudice myself in any way? What are the legal consequences and what defences do I surrender? I must be aware of this information under the standard of a voluntary act set by Miranda v. Arizona.

supra., for my act of presenting a direct appeal, or the mini bail appeal, to this Court to be an expression of my free will.

Unless the statutory jurisdiction of the District Court is positively and clearly stated then I was not "duly" convicted, yet if I confer jurisdiction to the Federal Court of Appeals to resolve the questions on appeal I am fearful a presumption is made that I accepted the charge, the trials, and the punishment in the lower court as being valid.

I appear to be in a catch 22 position. It is the government that caused this imposition upon my life, my property, and my liberty by presenting an insufficient charge (not made under oath) with the purpose of having me enter into a transaction creating liability regarding my property against my will. It is only fair to ask the government these questions since my Constitutional rights, privileges, and immunities are being

adversely affected, including my property and my liberty, and I need relief. Yet, how can I expect to get relief from a Court where my past efforts to get answers were fruitless, and the attorneys I have used, both privately and assigned by the government, seem to think the Federal Appellate Court is my only avenue for relief? How can I expect relief from a court system that did not, or would not, recognize the fact that my conviction was based upon a comparison of my conduct for the years 1978 and 1979 to my conduct in prior years and not to a positive law and allowed a conviction to be accomplished through an insufficient charge and with insufficient evidence which should have caused reversal with prejudice?

These are the very matters of substance that the Supreme Court in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, (1915) said would cause the Supreme Court to disregard the form of

income tax, that allowed them to declare it an indirect tax, and consider substance alone.

> Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, ..."
> (pp. 16-17) (emphasis added)

All of the actions in this case were based upon presumptions that jurisdiction will attach with some act done by me during the overall process, including the request of Bail Pending Appeal, and the appeal of a reviewable District Court decision. It now appears the only remedy available to me might be a Habeas Corpus. If I am in error on this, I pray this Court will inform me so that I can evaluate the options.

Since the District Court's reviewable decision has me scheduled for incarceration on Dec. 29, 1986 I plan to obey; not as a voluntary act but under duress for fear of my life, property, and liberty. The reviewable order results in duress of person, duress of property, and duress of imprisonment. Since the Court in the second trial at sentencing has already stated that when I get out of prison I can expect to hear from the IRS. I believe I am being forced to prejudice myself by the Courts implementation of statute 3143(b)(2).

I therefore pray this Court will render justice by responding to this Motion post haste with an immediate stay of the incarceration order by the lower Court so that this Court has ample time to fully explore the questions presented herein on the jurisdiction in both the Appellate Court and District Court, and to provide me the time to prepare myself for

any potential hearing you may plan and/or any other appropriate remedy available that I may choose. I further pray that this Court will respond with comprehensive answers so that I will be in a position to make an informed choice on how to proceed.

Dated December 20, 1985

Respectfully submitted,

(signature)

Frank Kowalik, Jr., pro se
4711 N. Portland Avenue
Oklahoma City, Ok. 73112
(405) 947-8280

CERTIFICATE OF SERVICE

It is my understanding that an Ex Parte Motion does not require service to anyone.

Certificate of Assessments and Payments

Income

Name of Taxpayer (On record)	Address (Number, street, city, and state) (On record)	EIN or SSN
Frank & Karen Kowalik	4711 North Portland Oklahoma City, Oklahoma 73112-6109	205-16-8121

Date (a)	Explanation of Transactions (b)	Assessment (Abatement) (c)	Credit (Credit Reversal) (d)	Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
							December 31, 1975
04-15-76	Remittance return filed	7,930.24	2,020.22		87212-107-44099-76	06-14-76	
	Withholding & excess FICA		6,118.85				
	Unallowable tax hold	208.83					
	Audit deficiency	.00			88247-321-00630-76	12-13-76	
	Unallowable tax hold reversed		208.83		87212-107-44099-76		
12-13-76	Interest due taxpayer		9.17		88247-321-00630-76		
12-13-76	Refund		(218.00)				
				-0-			

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Director (required for certification)
Robert E. Wenzel, Director
By: Patsy L. McFarland, Supv., Inst/Trans/Erg Ref Unit

Location: Ogden, Utah

Date: October 29, 1986

Form 4340 (Rev. 7-80) Use and issue first "Rev. 7-74"

Department of the Treasury - Internal Revenue Service

EXHIBIT "G"

App. 48.

Certificate of Assessments and Payments

Income

Name of Taxpayer	Address (Number, street, city, and state)	EIN or SSN
On record Frank Jr. Kowalik	On record 4711 North Portland Oklahoma City, Oklahoma 73112-6109	205-16-8121

Date (a)	Explanation of Transactions (b)	Assessment (Abatement) (c)	Credit (Credit Reversal) (d)	Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
							December 31, 1978
08-18-80	Delinquent notice						
10-09-80	Not liable this period	.00	.00		29249-683-00427-80		
09-15-80	Substitute for return prepared by Dept	.00	.00		04211-264-01207-80	11-03-80	
	No record of return filed by taxpayer			-0-			

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Director (required for certification)
Robert E. Wenzel, Director
By: Patsy L. McFarland, Supv., Inst/Trans/Err Ref Unit

Location: Ogden, Utah

Date: October 29, 1986

Form 4340 (Rev. 7-80) Use and issue first "Rev. 7-74"

Department of the Treasury - Internal Revenue Service

EXHIBIT "H"

Certificate of Assessments and Payments

Name of Taxpayer	Address (Number, street, city, and state)	EIN or SSN
Frank Jr. Kovalik	On record 4711 North Portland Oklahoma City, Oklahoma 73112-6109	On record 205-16-8121

Date (a)	Explanation of Transactions (b)	Assessment (Abatement) (c)	Credit (Credit Reversal) (d)	Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
							December 31, 1979
09-15-80	Substitute for return prepared by Exam No record of return filed by taxpayer	.00	.00	-0-	84211-264-01102-80	11-10-80	

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of Director (required for certification)	Location	Date
Robert E. Wenzel, Director By: Patsy L. McFarland, Supv., Inst/Trans/Err.Ref Unit	Ogden, Utah	October 29, 1986

Form 4340 (Rev. 7-80) Use and issue first "Rev. 7-74" Department of the Treasury - Internal Revenue Service

EXHIBIT "L"

App. 50.

EXHIBIT "J"

for 2 July

AO 83 (10/82) — SUMMONS IN A CRIMINAL CASE

United States District Court

DISTRICT: Colorado

UNITED STATES OF AMERICA

v.

FRANK KOWALIK, JR.

DOCKET NO. 84-CR-193

MAGISTRATE CASE NO.

TO: (NAME AND ADDRESS OF DEFENDANT)
Frank Kowalik, Jr.
4911 N. Portland
Oklahoma City, OK 73112

YOU ARE HEREBY SUMMONED to appear before the ☐ U.S. District Court or ☒ U.S. Magistrate at the time, date and place set forth below

PLACE	ROOM NO.
United States Courthouse 1929 Stout Street Denver, Colorado	Courtroom C169
	DATE AND TIME July 17, 1984 - 11:00 a.m.

To answer a criminal ☐ Indictment ☒ Information ☐ Complaint ☐ Violation Notice

charging you with a violation of UNITED STATES CODE TITLE 26 SECTION 7203

DESCRIPTION OF OFFENSE:

Willful failure to file income tax returns.

PRIOR TO APPEARANCE IN COURT
REPORT AS FOLLOWS:
PRETRIAL SERVICES, ROOM C-122 10 00 A.M.
U. S. MARSHAL, ROOM C-325 10 30 A.M.

SIGNATURE OF CLERK OF COURT[1]
JAMES R. MANSPEAKER

(BY) DEPUTY CLERK
Marilyn E. Falls

DATE
July 2, 1984

1) Clerk may sign a summons on an indictment or information supported by a showing of probable cause under oath. Federal Rules of the Criminal Procedure Procedure, Rule 9.

↑

NOTE: Oath Requirement

EXHIBIT "K"

IN THE UNITED STATES COURT OF APPEALS
THENTH CIRCUIT

No. 84-2600
D.C. 84-CR-193

FRANK KOWALIK, JR.
Petitioner, pro se

v.

ZITA L. WEINSHIENK, Judge U.S. Dist. Ct.
Respondent

AMENDMENT TO PETITION FOR
WRIT OF HABEAS CORPUS

I, FRANK KOWALIK, JR., petitioner pro se and sovereign citizen of the State of Oklahoma, hereby ask this Court to amend Petition for Habeas Corpus as follows:

If I, Frank Kowalik, Jr. make a voluntary appearance at the scheduled new trial, Nov. 3rd, the Court will presume it has jurisdiction over my person. This will then be construed to mean that I am the person in the subject matter since I answer the IRS claim. Whereas, if I am forced by arrest to appear the utilization of the foregoing is not possible.

If I provide my person to the Court and I claim double jeopardy remedy in my defence (since I was tried and punished for this offence) it would be construed by the government (for the IRS) that I stipulated to being the person in the subject matter in the first trial, and the IRS regular enforcement would be initiated. If I do not claim the double jeopardy remedy, I loose my remedy in appeal by implied waiver. This is not due process of law, this is IRS enforcement to which those in the Justice Department and the Court have taken it upon themselves to aid the IRS in compelling specific performance for their enforcement procedure. Hence, my conduct is being controlled by government actors, thereby violating of my First Amendment right to of freedom of expression. It is also violative of the Fifth Amendment since due process of law is not being respected when I am forced to waive my double jeopardy

remedy as a defence.

It is evident from the conduct of those in the District Court that they are anxious to rush me into another trial and judgment in this case prior to receiving answers from this Court on my Petitions. The need to create a new record on this case, so that the questions raised in all pleadings become moot, is clear to me. It is also obvious that it is my conduct that will provide presumptive jurisdiction to the District Court.

This is demonstration and proof to my original argument in my appeal that I was not, I am not the person in the subject matter of 26 USC 7203, and not included in the definition of "Person" in 26 USC 7343. Also, this goes to the proof that no Public Law exists that requires me to make a return, create liability in favor of the IRS, and requires me to declare my personal property as income for Federal Tax purposes. Since this type of

manipulation is being used in the IRS enforcement procedure to control my person and have me make a return. Also, the IRS admission that they have no returns from me for 1978 and 1979 is a stipulation that I am not subject to the jurisdiction thereof with regard to Title 26, and therefore I cannot be subject to the jurisdiction of 26 USC 7203 and am not the person in 7343.

Further, if I do not use the double jeopardy claim as remedy and proceed to trial, upon conviction I will receive punishment a second time. Upon appeal my waiver will be noted as my freedom of expression being employed. Therefore, even due process with regard to an appeal is controlled, depriving me of my right to appeal.

I now ask whether this case is legally out of the Appellate Court, since the Order and Judgment was only executed by your Clerk and documentation requested to

substantiate that this was truly the order of the three-judge panel was never provided. Further, I have been unable to locate any statute or rule that confers authority to the clerk to execute Orders and Judgments. I claim this hearsay document is insufficient to confer authority to the District Court to order another trial. The motive for the rush-to trial might be to prevent me from bringing the questions of law involved to the Supreme Court, or simply to dignify the actions of those in the lower courts in their IRS enforcement proceeding, which was called a trial, or it may be to have me answer my appeal question that I am not the person in the subject matter by going to trial and using the double jeopardy defence. Whatever the reason for their haste, it is not following due process and cannot result in a fair trial absent the Public Laws that create the standard under which my conduct is to be compared.

A trial under these conditions can only be prejudicial to me and unfair for I cannot offer a defence if I am not provided the law that creates the crime against which my conduct is to be compared. Without stating the Public Law that requires me to file returns taxing my personal property directly, and prescribes criminal punishment for failure to file, and a Public Law that taxes remuneration received for personal services in the private sector (similar to the one taxing Federal employees in 12 Stat. 473, Sec. 86 passed by Congress in 1862) and classifies such remuneration as income, I cannot defend myself for without such laws the only thing that can be compared is my conduct now to my previous conduct and not comparing my conduct to any legal duty. Therefore, without stating such laws specific intent could not be proven. Yet, conviction is almost certain and I will undoubtedly find myself again in prison

with a lengthy appeal process that will render the issues moot after time is served. Knowing this, those insisting on a new trial must have a vested interest in making a new record because it is certainly not due process.

I am trying to defend myself following due process, as the record will show, but this has been ineffective since due process is not being followed by those in the Courts.

My former attorneys assured me that the question on original jurisdiction could be brought up at any time, they merely failed to tell me that it would not be answered.

The Appellate Court's avoidance of the jurisdiction question and not stating the Public Law's requested, and the anxious efforts of those in the District Court to act without such answers being provided is evidence that due process is not a primary concern in this case. The primary concern

seems to be to change the record and AID IRS ENFORCEMENT, and NOT to provide JUSTICE UNDER THE LAW.

The long delay in answering my Petition for Writ of Mandamus and subsequent threats by those in the lower court (letter from Zita L. Weinshienk) caused me to file the Petition for Writ of Habeas Corpus. My efforts in trying to prepare some sort of defence and finish my Jurisdictional Statement (as well as conduct my life with some normalcy) has been further stifled. I have been informed through phone calls received by my wife from Judge Weinshienk's secretary, Joan Boline, and her law clerk, Phil Brimmer, that a warrant has been issued for my arrest. These phone calls were for the purpose of effectuating my voluntary submission to trial, thereby creating presumptive jurisdiction in that court. The added duress of possible arrest is nothing less than a coercive tactic to

force my specific performance, which in turn negates any action on my part from being lawfully construed as voluntary under the dictates of Miranda v. Arizona, 384 US 436 (1965) and further demonstrates that these actions against me are enforcement proceedings, not for the purpose of a true criminal action, since criminal action requires due process be honored by those in the courts.

I am only trying to defend myself using due process, which is proving impossible without stating the laws which create a lawful duty upon me to which my conduct is to be compared. As you can see, I am in an untenable position and need help from someone in authority over those in the lower court.

I further believe that the venue jurisdiction in the U.S. Territory is only possible with my agreement. Therefore, execution of an appearance bond would prejudice my protection as to venue

jurisdiction. The coercion by using my property to compel my specific performance of an appearance bond is not in keeping with due process, it is enforcement.

This is enforcement in my being selectively prosecuted, to serve the IRS as an example to deter others in society from expressing their own will and for IRS prejudicial publicity.

It is only by law that establishes a duty upon my conduct, not my former conduct that establishes a duty upon my present conduct. The lower court's form of gaining complete jurisdiction, absent such a law, makes this appear to be a quasi in rem action which provides criminal punishment upon conviction. Which is also impossible under law.

My Fifth amendment right to due process and not to be compelled to be a witness against myself forbids the coercive form conduct being used by those in the District Court to bring me into

another trial.

All of these attempts to bring me to trial is to compel me to make myself the person in the subject matter through acquiescence. Even this does not constitute waiver of subject matter jurisdiction since subject matter jurisdiction cannot be waived. However, if this goes to trial and I am again unduly convicted by a jury and subjected to prison, how can I expect relief on appeal when the same questions will be presented and they were not answered the first time? This is not due process, but malicious use of the courts to enforcement income tax upon me when no law is available for the IRS to accomplish that end. Is this type of enforcement that the Supreme Court in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1915) makes reference to and said would cause the Supreme Court to disregard the form of the tax and consider substance alone.

Matters of substance have been affected in this case.

I pray this Court makes a speedy stand to prevent further action in the lower court and dismiss this case with prejudice.

Respectfully submitted,

(signature)

Frank Kowalik, Jr.
4711 N. Portland Ave.
Oklahoma City, OK. 73112
(405) 947-8280

CERTIFICATE OF SERVICE dated Oct. 29, 1986 to:

Zita L. Weinshienk, Judge U.S. Dist. Ct.

Robert N. Miller, U.S. Attorney
Thomas M. O'Rourke, Asst. U.S. Attorney

Magistrate Donald e. Abram

Probation Dept.; Atten. John Devine

U.S. Marshal, Denver, CO.

Stuart Earnest, U.S. Marshal, OKC, OK.

EXHIBIT "L"

PRESENTENCE INVESTIGATION REPORTS

Abusive extension of power to unauthorized government entities through administrative tactics is reflected in the way a PSI report is used.

The Presentence Investigation Report (hereafter PSI) contains factual personal data and conclusions made by the probation officer preparing the report, along with a statement by the prosecuting attorney and the defendant if prepared and presented.

In my case, I refused to sign these reports primarily because of the reference to "tax evasion" to the tune of an astronomical figure, first of all because I was not charged or convicted of "tax evasion (which is a felony) and felt it would prejudice me. My subsequent studies of the Code of Federal Regulations (hereafter C.F.R.) proved I was correct in my apprehensions. Reference to "tax evasion" is used by the Justice Dept. to

justify keeping a person in prison beyond the guidelines in the C.F.R. by classifying it as a more severe crime. The response to my request of the probation officer to delete this prejudicial statement was that the report standard phrasing and is only for the courts eyes. I made my request again in open court at the sentencing, and the Court denied my request saying it would not prejudice me in any way.

My personal experience with regard to this is to the contrary, and the form a defendant is now asked to sign (revised Feb. 1986) admits the P.S.I. is used by the Federal Bureau of Prisons. The NOTICE TO DEFENDANT CONCERNING THE PRESENTENCE INVESTIGATION REPORT paragraph 3 reads:

> The presentence report also plays an important role in the parole process. The United States Parole Commission uses it as a primary source of information for calculating the inmate's parole release date. The united States Parole Commission may consider total offense severity, and not just adjudicated counts, in making its parole decisions.

I was asked to sign and mark a box that indicated I have head and understand this notice. What I understand is that the executive branch of government is now accepting judicial functions by the use of a form where the defendant has literally given the U.S. Parole Commission permission to change the "adjudicated counts" at their discretion. It seems to me their overstepping of authority with regard to C.F.R. Guidelines was bad enough, now they want permission to usurp judicial authority and make their own laws as well.

I did not sign the "Notice", but I did compose and sign a statement for inclusion with the PSI of my second trial. However, upon reviewing my file at prison, I found my statement was not attached to their copy of the PSI report. The following is my statement.

DEFENDANT'S STATEMENT REGARDING
THE OFFENSE
AND THE PRESENTENCE INVESTIGATION REPORT

Defendant: FRANK KOWALIK, JR.
Docket No. 84-CR-193

A person cannot be "duly" convicted of a crime in a Federal court where the subject matter does not control the conduct of the defendant through a specific Public Law. The criminal sanctions under 26 USC 7203, willful failure to make returns, is limited to the specific persons "under a duty" to make returns. Those persons are distinctly defined in 26 USC 7343 and have voluntarily accepted the responsibility (duty) of reporting the "income" and/or will of others.

Congress is constitutionally prohibited from passing any income tax law that mandates such conduct of private individuals with regard to their own personal property and so such statutes are structured with permissive language with no criminal penalties made applicable with regard to ones own personal property.

I, being a private individual not under any lawful "duty" to declare my personal property is income for Federal

income tax purposes, merely exercised my First Amendment right in choosing not to make returns for the years 1978 and 1979, which in turn preserved and protected my fourth and Fifth Amendment rights. This is not a crime under any law of the United States, and so the United States District Court lacked subject matter jurisdiction in both of my trials as to me. The Appellate Courts remand for new trial without addressing this issue did not change that status nor cause jurisdiction to suddenly prevail in the District Court.

Notwithstanding the lack of jurisdiction to hear this case, the fact that Congress left it to the Courts to define "income", and the Courts have never considered remuneration received for personal labor as "income", the commissions I received in 1978 and 1979 could not be made taxable under any circumstance by the government without a voluntary declaration made by me, under penalty of perjury, that my commissions

were to be considered income and taxable as such. Since I did not make such declarations in the years 1978 and 1979, the only portion of the "income" figures that MIGHT be defined as income was the dividends and interest. Even so, the Constitution prohibits enforcement through compulsion, forcing me to relinquish rights secured to me under the Constitution.

By the governments witness' testimony (TT 142,143) the net dividend and interest in 1978 was $390.27 and net dividend for 1979 was $1,109.90. Such figures could not result in a tax of between $20;000.00 and $100,000.00 as stated in the PSI report under "PAROLE PROGNOSIS" and shown as "tax evaded", making the PSI report false on its face. Furthermore, reference to "tax evasion" (a felony under 26 USC 7201) in the PSI report, when the alleged offense is "willful failure to make returns" (a misdemeanor), makes the report unjustifiably prejudicial. First of all,

the government is not required to prove taxes are due and owing in a 7203 trial, but is required to do so in a 7201 case, and so any figure supplied by the government to the Probation Officer in a 7203 case is defective and false. Secondly, reference to "tax evasion" in a 7203 conviction is used by the Justice Department to justify the use of Chapter 5 of 28 C.F.R. 2.20, in place of Chapter 12, as a parole guideline, thereby keeping the person in custody beyond the regulated period of time prescribed. This is extremely prejudicial to the convicted individual.

The revised "Notice" regarding the PSI report now contains a paragraph that actually condones the transfer of judicial power to the executive branch of government. Paragraph 3 reads:

> The presentence report also plays an important role in the parole process. The United States Parole Commission uses it as a primary source of information for calculating the inmate's parole release date. The United States Parole Commission may consider total offense severity, and

not just adjudicated counts, in making its parole decisions." (emphasis added)

I feel this is an excess of power outside Constitutional bounds that was not intended by Congress. Furthermore, the "Notice" appears to be provided so that I may freely express that it is proper for any government agency, including the United States Parole Commission, to control my person, my liberty, and my property with regard to any information, including the charge, in the Presentence Investigation Report. My signature indicating that I have read and understand this notice and have read the presentence investigation report connotes acceptance by me. This procedure is to control my freedom of expression in that if I accept what the United States Parole Commission will do, I also accept the enforcement procedure that has been imposed upon me, to which I object.

As for the Prosecuting Attorney's

statement attached to the PSI report, the so called "proof" offered was insufficient to sustain a conviction. He merely compared my conduct with regard to 1978 and 1979 to my conduct with regard to returns in prior years. A valid conviction requires comparison to a legal standard that is clearly stated in law. He then used a government employee, not qualified to state the law, to give her opinion that such a law exists. A fair trial demands that the Prosecuting Attorney produce the best witnesses possible, and the government does have lawyers at their disposal who should provide the legal testimony on the laws that control a defendant's conduct. It is because no law exists that such lay witnesses must be used to obtain a conviction through the manipulation of citizens seated as jurors who's thinking on taxes has been conditioned and controlled for decades by the government.

As for the testimony of Mr. Widger,

the record will show when cross examined he could not recall if I made the alleged statement to someone else or to himself. His testimony about my executing an improper W-4 form merely showed my intent not to declare my commissions as income for Federal income tax purposes, which is my right to do pursuant to 26 USC 3402(p). Then he submitted testimony that I had full access to the cancelled checks, thereby not requiring any assistance from him if I wanted to obtain any of the cancelled checks. Furthermore, the checks used as evidence (to which I objected) were obtained by the government from a Court ordered liquidation of a company who was seeking Chapter 11 reorganization. The government in the first and second trials never submitted how these checks were obtained. This question goes to illegal search and seizure and inadmissible evidence.

The government's evidence and

witnesses go to prove that this case was not a trail under the law, but a proceeding designed to aid in enforcement of a tax not lawfully assessable by the IRS without a declaration of liability by me. This sort of coercion and duress to achieve enforcement affects matters of substance (rights, privileges, and immunities under the Constitution) and transforms the tax from an indirect tax to a direct tax in need of apportionment to remain constitutional.

I wish to make a record that the Notice, the Prosecutor's Statement and erroneous information contained in the PSI, such as reference to "tax evasion", abusively exceed the intent of the PSI report as required pursuant to the Rules of Criminal Procedure. I express my freedom of choice and will not OK the report. I only make the foregoing record.

/s/ Frank Kowalik, Jr. 12-8-86
Defendant Date

EXHIBIT "M"

December 1, 1986

Zita L. Weinshienk, Judge U.S. Dist. Court
District of Colorado
UNITED STATES COURTHOUSE
1929 Stout Street
Denver, Colorado 80294

RE: U. S. v. FRANK KOWALIK, JR., 84-CR-193

Honorable Judge Weinshienk,

This letter comes to you with three fold purpose, first to apologize for any misconception of my feelings toward the Court. I have the utmost respect for the form of government established in this country by our forefathers, and a strong desire to see that it is purely preserved. If my communications made it appear otherwise, I humbly apologize and wish to correct any misconception. Secondly, it is my hope that any impression that I am a tax protestor can be dismissed for I have no quarrel with any tax constitutionally enforced. In

it's place I hope you may come to understand that I am expressing myself seriously on the subject matter of taxation. And last, in order to avoid a lengthy sentencing hearing on Monday, Dec. 8, 1986, and still apprise you of some of my appeal issues (without revealing them in advance to my opponent) I felt conveying some appeal issues in this informal fashion for your consideration would be appropriate.

The ultimate issues not addressed by the Tenth Circuit three-judge panel in the appeal of my first trial remain open. One issue was the change made by Congress regarding bail pending appeal, which was simply countered by the government with a statement that the issue was moot since my release from prison had been effectuated before their answer was tendered. This, however, does not change the wording in the act (18 USC 3142(b)(2)), which says the determination of imprisonment is to be

made for the person "who has filed an appeal or a petition for a writ of certiorari". Hence, 3143(b)(2) is for the Appellate Court or the Supreme Court to decide. If this were not so there would have been no need to expand 18 USC 3141(b) to read, "or a judicial officer of a Federal appellate court, ..." (copy of my appeal exhibit - attached for your convenience). Congress could not intend, and due process would not permit, an appeal to be filed prior to sentencing. Also, placing the burden of determining appealable issues upon the court of original jurisdiction would seem to be an inappropriate and unfair responsibility to that court, and unfair to the Appellant for it basically denies him an appeal if he is incarcerated prior to final adjudication. It also provides the prosecuting attorney the unfair advantage of knowing what the appeal questions will be in advance of normal procedure,

thereby prejudicing the Appellants position. Additionally, many appealable issues are not known until after sentencing and receipt of transcripts. If bail pending appeal is denied me Dec. 8th, this issue will again be raised.

My incarceration for seven months after being denied bail pending appeal in 1984 created extreme financial hardship upon to me since my livelihood was drastically affected. Any long absence results in lost contacts essential in the real estate business. Denial of bail pending appeal in this instance will constitute an undue hardship for me to re-establish myself in the business community.

I possess the constitutional right to exercise my First Amendment right of freedom of expression with regard to my personal property unless my freedom of expression is contrary to a "duty" created by a Public Law passed by the United

States Congress, or created by contract or a declaration (such as a return) voluntarily executed by myself. Though requested by me, such a Public Law was not entered into the record in either of the two trials to which I was subjected, nor was such a law stated in the accusation made by Information. Summons was issued even though the Information was not attested to under oath by the prosecuting attorney making the charge against me insufficient to conduct a criminal trial for "willful failure to make a return." from its inception.

The denial of presenting the definition of "person" found in 26 USC 7343 was reversible error. This definition does not expand the general definition of person found in 26 USC 7701(a)(1) but replaces it for all sections of Chapter 75 (which includes section 7203). This distinctly expressed definition of "person" was attached to

every criminal sanction in the 1939 Internal Revenue Code [1]. (Note: all footnotes are on a separate page attached to this letter) A "duty" to perform the act in respect of which the violation occurs cannot constitutionally be placed upon a person with regard to his person and his personal property, but could apply to someone who knowingly accepted a fiduciary responsibility to report on the property of another.

It is the restriction of the criminal penalties associated with income tax to those under a "duty" that keeps the form of the tax within lawful bounds and allows it to be classified as indirect tax. However, the enforcement of this voluntary self-assessed tax by criminally prosecuting one, such as myself, who has chosen to exercise his First Amendment right not to declare his personal property taxable as income on a return (protecting Fourth [2] and Fifth [3] Amendment

rights in the process) negates the voluntary status of the tax that allowed the Supreme Court in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1915) to classify income tax as an indirect tax. That Court cautioned the government that the enforcement could well place the Supreme Court into the position of reconsidering the classification and require apportionment.(4)

Not providing the definition of "person" found in 26 USC 7343 left the jury with no legal basis, only hearsay basis, to determine if I was a person required to make returns and was error that constitutes grounds for acquittal. This definition was essential to my defence and a fact for the jury to consider that was not to be determined for them by the government witness, Sheri Betzer, and the Court. This goes to the question of determining the ultimate issues of fact for the jury, in place of

by the jury.

The fact that I am not a "person" to whom 26 USC 7203 applies was a primary issue in my appeal. I will now focus on the question of whether or not it was an abuse of discretion by the Appellate Court to pick and choose a subordinate issue (jury instruction) in order to technically allow remand for a new trial upon reversal of the conviction and judgment of my first trial when I had raised many substantial issues of law and fact in my appeal. This decision denied me my Fifth Amendment right to use double jeopardy as a defence, resulting in control over my life, liberty, and property. If I am again sent to prison, these same issues (and more) will be presented on appeal and should be fully answered if true justice is the goal of the Court.

The Court's definition of "gross income" in jury instruction #13 not only contradicted the actual definition in the

I.R.C. Section 61(a) given in jury instruction #12 but constituted a Court endorsement of the charge made in the Information (jury instruction #8) and endorsement of the opinion of the governments lay witness Sheri Betzer, to whom I raised an objection, thereby making her an legal witness. This is contrary to the fact and resulted in an unfair trial. By removing the determination of the validity of her opinion testimony from the jury (offered in jury instruction #6) and directing the verdict, the Court exhibited bias in favor of the government.

On the issue of what is taxable as income, you will note 26 USC 61(a) reads much like the Sixteenth Amendment, "income from whatever source". If the list shown in 61(a) is not a list of sources it would have plainly indicated "ON" the following or "IS" the following, and would have been shown in Part II of the I.R.C. "Items Specifically included in Gross Income."

(sections 71-87). Even the IRS acknowledges "Wages and salaries are the main source of income for most people." in their Publication #525 (Rev. Nov. 81) (emphasis added)

Every income tax act since it's origin in 1861 (12 Stat. 309, Sec. 49) reads income derived from property, professions, etc. When the Supreme court in Pollock v. Farmers Union & Trust co., 158 U.S. 601 (1895), declared a tax "ON" the income (gain/profit) from a direct source was to be classified as a direct tax, Congress felt the need to separate the income from the source. The Sixteenth Amendment was intended to achieve that purpose, but does not add any new taxing power to Congress.

The placement of the government employment tax, which originated in 1862 (12 Stat. 473, Sec. 86) under income tax first occurred in 1864 (13 Stat. 281 Sec. 123). Proof that this employment tax remained in force during the time income

tax was suspended by the Pollock decision (1895 - 1913) can be found in numerous acts of Congress. An example being the exemption from this tax on the wages of teachers in Alaska and Hawaii in 1902. Judges and the President have been taxed since 1932 (47 Stat. 169, Sec. 22(a)) even though the first attempt to tax judges salaries in 1919 (40 Stat. 1057, Sec. 213(a)) was declared an unconstitutional diminishment of their salary in Evans v. Gore, 253 U.S. 245 (1920). It was with the passing the Public Salary Tax Act of 1939 (53 Stat. 574) that State and local government employees were placed under the Federal employment tax. Then in 1942, the publicity (found in the N.Y. Times and other publications) that accompanied the passage of the Victory Tax (56 Stat. 884) implied the tax reached salaries of people in the private sector when the actual law was nothing more than an additional temporary 5% tax on income (gain/profit).

To install the misconception, the IRS supplied forms and charts to anyone who requested them. The prejudicial presumption that a law exists that requires private individuals to tax their property directly is perpetuated by continuing publicity on prosecutions such as mine, which Mr. O'Rourke admitted at the sentencing hearing after my first trial, was the purpose of my serving the IRS as an example to deter others from doing the same thing, which is involuntary servitude since I was forced to serve the IRS as their example.

The IRS was responsible for setting up the confidential relationship where my guard was reposed and so I taxed my property directly for over 30 years. When I learned otherwise and chose to no longer tax my property directly, the IRS and the Justice Department used my past conduct (which was not voluntary without full disclosure by the IRS) as the standard

provided to the jury to judge my conduct in the years 1978 and 1979 when the only lawful standard in a criminal case is a comparison to a Public Law. But in a trial to force my compliance, the prosecuting attorney tried to prove it was I who established the confidential relationship and abused the IRS in not making a return. If there is merit in the IRS position it would be a civil matter at best, not criminal.

To further corroborate my stand, the limitation of the employment tax to government employees is clearly stated in the 1954 Internal Revenue Code, section 3401(c), Definition of Employee, which reads:

> "For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing."

This acts as a limitation of the definition of "wages" in 3401(a) making

"wages" a term in the I.R.C. that applies solely to government employees. It also explains the need for two provisions in the code for withholding statements, one in 3402(a)(1), requirement of withholding for government employees, and one in 3402(p) allowing the Secretary to provide for withholding on "other types of payment" (not wages) by "the person making and the person receiving the payment," who "agree to such withholding." by the proper execution of a W-4 form, and such person calls his remuneration for services rendered wages and shows his intention to declare those wages for income tax purposes. The undue influence put upon private employers and their employees by the IRS, and its publicity, causes actions under this relationship between the government and these people to be voidable.

I have searched diligently through tax acts Congress had passed over the past 125

years and have not found a tax "ON" salaries, commissions, or any form of remuneration for services in the private sector and firmly understand this is so because:

(1) Congress could not constitutionally pass a law that impairs the right of persons to contract for the exchange of their labor (property) for whatever property the person employing them was willing to give them,

(2) that the tax on Federal government employees was possible only as a condition of employment, just as any private employer could impose conditions of employment upon people in their employ. Fairness is shown these government employees since after 20 years all monies paid in the form of this employment tax is returned in the form of a pension, a consideration not given to those in the private sector, which brings up a 14th Amendment question and a question of uniformity with regard to these indirect IRS taxes.

(3) that Congress merely provided the IRS with permission to accept any self-assessed tax that a person voluntarily declared, under penalty of perjury, was to be considered taxable as income. The attached Exhibits is the governments offer of proof that I was not liable for taxes for the years 1978 and 1979, demonstrating that no returns creates zero liability and Therefore, the only purpose of the charge and trial action was to compel specific performance of executing a

return in order to create liability in favor of the IRS[5] and also effectuating my return to involuntary servitude, which contradicts the charge and is grounds for acquittal.

(4) that the charge, trial action, conviction, and sentencing to prison is enforcement of a voluntary compliance, self-assessment program that transforms the indirect form of this tax into a direct tax in substance, thereby subjecting it to the restriction of apportionment.

Criminal prosecutions of persons not "under a duty", as defined in 7343, violate substantive rights of that person. This is exactly the sort of enforcement the Supreme Court in Brushaber cautioned against that would make it a direct tax.[4] Surely the IRS exceeds lawful due process with unlawful charges that deprive citizens of rights, liberty, and property secured to them under the Constitution in order to continue the misconception that a law exists that requires a person to tax his property directly.

Among other questions on appeal will be the governments failure to establish

how the checks introduced as evidence in my second trial, over my objection, were obtained when they chose not to call Mr. Warren, IRS Special Agent, to testify (technically making the checks inadmissible). A serious question surfaces when the fact that they were procured through a court ordered liquidation after the President of Income Realty, Mr. Riley, had refused to relinquish this information to Mr. Warren's counter part, Mr. Batson, in earlier contacts. This matter goes to the question of illegal search and seizure.

The Court is aware that I was employed by Income Realty & Mortgage (I.R.M.) during the years 1978 and 1979. For your information, I plus two other employees of I.R.M. who were members of the National Commodity and Barter Association (N.C.B.A.) were charged by the IRS. All other employees of I.R.M. who were investigated by the IRS that were not

members of N.C.B.A. were not charged. I am sure the Court is also aware that N.C.B.A. and it's members have been targeted by the IRS. This leads me to understand that selective prosecution resulted in my case, especially in view of the previous paragraph.

You may recall, at the sentencing hearing, Nov. 14, 1984, following my first trial, I refused to sign the Presentence Investigation Report (PSI) that reflected "tax evasion". You indicated it was common practice to use this terminology and it would not prejudice me. However, I feel to attest to "tax evasion" "under penalty of perjury" would not only negate any effort to refute future claims of the IRS in civil proceedings but would be an act of perjury. Hence, I will not prejudice myself, nor perjure myself, by signing an erroneous PSI Report. Also, I can personally verify the fact that it did prejudice me. For your information, this

report is used by the parole board in considering guidelines for parole. 28 C.F.R. 2.20 has only one chapter for taxes and it only applies to "tax evasion", a felony under 26 USC 7201. There is no chapter on misdemeanor tax matters. Hence, without reference in the PSI Report, attested to "under penalty of perjury" by the prisoner, the parole board has difficulty justifying the use of "tax evasion" (chapter 5) as a guide in place of Chapter 12, which states if an offence cannot be graded by reference to chapters one-eleven the following may be used as a guide ... for a maximum sentence authorized by statute ... up to 2 years ... category (1) with salient factor 10 (my salient factor) the decision guideline in 1984 was 6 months for customary total time to be served before release. This time has been changed to 4 months in the 1986 CFR. Therefore, may I recommend that my time has already been served.

Also, absent the finding of a definition of a "Minute Order" in law dictionaries or any reference in Court rules on its use, I am inclined to believe it is not an official order of the court. Your Order, dated 9/3/86, stating in part,

> "FURTHER ORDERED that defendant shall make arrangements to appear before United States Magistrate Donald E. Abram at the United States Courthouse; Room C-160 (844-6408), on or before Sept. 5, 1986, for execution of the $5,000.00 unsecured bond, for the setting of a discovery conference, and for advisement under Fed.R.Crim.P. 44(a), and shall notify Assistant United States Attorney O'Rourke of the appearance date and time."

technically made an appearance under that order and the execution of an unsecured bond a voluntary act on my part even after Magistrate Abram's office sent out an unsigned "Minute Order", 9/5/86, that seemed to make it mandatory. I believe such a so called voluntary action on my part would then be construed as a voluntary waiver of jurisdiction over my person and acceptance of venue jurisdiction in the Federal court

(territory) for a new trial.

After my written attempts to challenge the jurisdiction of the District Court over a second trial for the same offence appeared to be failing (unanswered), I decided to make a special appearance for the sole purpose of clarifying the jurisdiction question before the court. From my studies, I understand that addressing any topic other than jurisdiction transforms a special appearance into a general appearance. For this reason I would not address the issue of executing the unsecured bond in order to obtain the release of my property (held by the government in the form of a $20,000 Appeal Bond) at the hearing before Magistrate Abram held 9/22/86. Hence, all subsequent references that I refused to sign an unsecured bond is erroneous, I merely kept to the question of jurisdiction at that appearance. Jurisdictional questions presented in any

court should take priority and deserve answers and, as I understand it, any action taken in a court that lacks jurisdiction has no legal force.

An unsigned "Minute Order" emanated from your office 10/26/86 stating "It is ORDERED that this case is set for a status conference ..." without stating who had to personally attend. Copies were sent to Asst. U.S. Attorney O'Rourke, Magistrate Abram, John Devine of the Probation Dept., the U.S. Marshal and myself. I could not construe the court intended all who received copies were to personally be present at the "status" conference since Magistrate Abram's name was on that list. And then the "Minute Order" said "FURTHER ORDERED that defendant may appear by telephone if the Court is notified by Thursday, October 23, 1986. Since the word "status is not found in Black's law dictionary I had to rely on Webster's, where it said "the condition of a person

or thing in the eyes of the law; ... state of affairs" I felt my "status" hinged on whether the court had jurisdiction over this case and so I tacked a P.S. on my letter to you of 10/14/86 about this conference. To this you responded with a personal letter 10/21/86 stating "Failure to appear at either the status conference or the trial will result in a bench warrant for your arrest." and indicated the purpose of the conference, which did not include addressing the jurisdictional question. When I did not appear 10/27/86 for the "status conference" you had people from your staff call. My wife relayed the message and on Wed. 10/29/86 she made arrangements for a telephone conference to be held Fri. 10/31/86 which could not take place since I was incarcerated under your bench warrant Wed. evening and transported to Denver 10/31/86. This negates any possible misconception that the unsecured bond I executed the following Monday

represented any voluntary waiver of any jurisdiction to the Federal Courts.

Other issues may be available for appeal after reviewing the trial transcript, however, notwithstanding that this matter is not for this court to decide, I sincerely pray the information provided to you in this letter is sufficient to support my position that substantial questions of law and fact do exist that would allow you to grant me bail pending appeal pursuant to 18 USC 3143(b)(1), which provides for unconditional release on personal recognizance pursuant to 3142(b), and order the release of the unsecured bonds executed July 23, 1984 and November 3, 1986, and the release of the $20,000 appeal bond posted Nov. 14, 1984.

Respectfully submitted,

(signature)

Frank Kowalik, Jr.
4711 N. Portland Ave.
Oklahoma City, OK. 73112
(405) 947-8280

FOOTNOTES

(1) See 1939 I.R.C. sections 145(d), 894(b)(2)(D), 1718(d), 1821(a)(4), 2557(b)(8), 2707(d), 3228, 3710(c), 3793(b)(2).

(2) "It does not require actual entry upon premises and search for the seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or a forfeiture, is within the spirit of the meaning of the Amendment." Boyd v. U.S., 116 U.S. 616 (1886)

(3) "The information revealed in the preparation and filing of an income tax return is, for Fifth Amendment analysis, the testimony of a 'witness' as that term is used herein." Garner v. U.S., 424 U.S. 648 (1976)

(4) "Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, ..." Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 16-17 (1915) (emphasis added)

FOOTNOTES (continued)

(5) The power of the master to compel the specific performance of an ordinary contract for personal services has never been recognized either by the laws of England or those of the United States. In case the servant abandoned the service of his master before the completion of the contract, the master could always maintain an action to recover damages because of the breach of such contract, but could never compel a specific performance." Clyatt v. United States, 197 U.S. 207, 214

ATTACHED: 18 USC 3143 & IRS Forms 4340

EXHIBIT "N"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RE: District Court Action No. 84-CR-193
RE: Petition for Writ of Mandamus, 10th Cir. No. 86-2474
RE: Direct Appeal, 10th Cir. No 84-2600
RE: Petition for Writ of Habeas Corpus, Dist.Ct. No. 86-K-1936

FRANK KOWALIK, JR.
Petitioner, pro se

v.

ZITA L. WEINSHIENK, Judge, U.S.Dist. Court
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, FRANK KOWALIK, JR., petitioner, pro se, pursuant to 28 USC 2241 asking this Court to issue a Writ of Habeas Corpus, directed to the Honorable Zita L. Weinshienk, directing the release of petitioner from all restraints of his liberty by vacation of all action in the District Court of Denver Colorado in the case known as 84-CR-193 to avoid additional unjust deprivation of my life, liberty, and property by actions of

government employees.

In 1984 I was accused by Information of violation of 26 USC 7203, willful failure to file returns (in which the cause of action is proof that I was not subject to the jurisdiction of U.S. Code Title 26), and convicted by a jury through hearsay evidence, suppression of the truth, and prejudicial presumptions. The facts are these:

(1) The record and judgment will show that all government employees who were involved in this prosecution were aware that I was not a person to whom the subject matter was made applicable by Congress, and that jurisdiction was deliberately presumed by all government actors as though this case was civil when it was criminal. For example, I was tricked into agreeing to venue jurisdiction (U.S. Territory) by the Magistrate.

(2) That since criminal subject matter jurisdiction cannot be waived, my

appearance (made with an attorney) and submission to the trial and punishment that resulted cannot alter the fact that I was deliberately and unduly convicted for the purpose of serving the IRS in their enforcement of income tax in areas not made available to them by Public Law passed by Congress.

(3) That the judgment rendered did not reflect the cause of action, proving that Judge Zita L. Weinshienk knew the Court did not have jurisdiction over me as to the subject matter, nor over my person.

The record reflects the prosecution was for the sole purpose of having me serve as an example for the IRS to deter myself and others from bucking their illegal enforcement program (violative of the First and Thirteenth Amendments). The record also proves I was sentenced to additional prison time for not submitting to the will of those in the Court by refusing to accept their bribe of reduced prison time <u>IF</u> I cooperated and filed

returns (violative of the First, Fifth, and Eighth Amendments). All proving I was not duly convicted.

(4) That my appeal of the case was not properly handled since that Court had no discretion under the circumstances of this case to reverse on a technical issue presented; ignore all major issues of law and fact; and with knowledge that I had already served prison time under the judgment rendered in the first trial, to remand for new trial where a second trial would violate the double jeopardy clause of the Fifth Amendment (32 Am.Jur. 2d Sec. 420). The intent of those in the Appellate Court was made manifest when my Petition for rehearing based upon these facts was summarily denied.

(5) The methods used to once again bring me to trial despite the obvious lack of jurisdiction (including venue jurisdiction) make this case even more bizarre and unjust. Zita L. Weinshienk refuses to release my property ($20,000

Appeal Bond) after the reversal of the conviction by the Appellate Court unless I execute an unsecured appearance bond, which is nothing less than a coercive tactic to use power over my property to gain my presumptive consent to the venue jurisdiction of the Federal Court (territory), however, these circumstances hardly meet the criteria needed for a voluntary act under the precedent setting Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1965). The unjustified holding of my property constitutes deprivation of property without due process.

(6) Numerous other deviations from due process are covered in my various efforts within the courts to have the continuing harassment and unjust actions of the government actors come to a halt.

The bottom line is that all the actions taken in this case by government employees were for the purpose of achieving enforcement of income tax in

areas not available to the IRS by the United States Constitution and Public Law passed by Congress, and affected matters of substance in that they deprived me of life, liberty and property without due process.

The courts were used by government actors as an extension of the IRS enforcement program to achieve the unlawful end of forcing a private citizen to directly tax his property. This conclusively changes the income tax to a direct tax.

In the precedent setting Supreme Court decision in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1915), it was stated that income tax could only be considered an indirect tax so long as the enforcement of the tax did not place the Supreme Court into the position of declaring it a direct tax, in need of apportionment. At pages 16 and 17 they said:

> "Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, ..."
> (emphasis added)

Have we reached that crossroad?

Under the circumstance of an enforcement type case it is impossible for one to defend himself of abusive process which is selective criminal prosecution for an action in Rem and involuntary servitude.

Zita L. Weinshienk, in her personal letter to me of Oct. 21st, threatened to issue a bench warrant for my arrest if I did not appear in District Court for a status conference on Oct. 27th and the trial scheduled to commence Nov. 3rd. I feel I have stated my status in writing on

many occasions and contend that if the Courts cannot offer proof that congress has made 26 USC 7203 applicable to me through Public Law requiring me to file returns taxing my personal property directly, and prescribes criminal punishment for failure to file, and a Public Law that taxes remuneration received for personal services in the private sector (similar to the one taxing Federal employees in 12 Stat. 473, Sec. 86 passed by Congress in 1862) and classifies such remuneration as income, then the Court lacks judicial competency as to the subject matter in this case. However, the threat to have me arrested under a bench warrant was repeated to my wife in a telephone conversation by Zita L. Weinshienk's secretary, Joan Boline, made under Judge Weinshienk's direction. Absent total jurisdiction (including venue jurisdiction), Zita L. Weinshienk's actions to hold the status conference and

the trial would have no lawful base and any arrest initiated by her to forcefully have me appear would constitute false arrest and proves the claim of enforcement stated herein.

The remedy of Habeas Corpus is available when a court is without jurisdiction to try me or when in it's proceeding my constitutional rights are denied. Bowen v. Johnston, 306 U.S. 19 (1938). To render justice and to preserve the dignity and authority of the Court I pray that a Writ of Habeas Corpus will be immediately issued by this Court releasing my person and property from all restraints presently inflicted by the District Court through Zita L. Weinshienk.

Dated: Oct. 28, 1986.

Respectfully submitted,
(signature)

Frank Kowalik, Jr.
4711 N. Portland Ave.
Oklahoma City, OK. 73112
(405) 947-8280

CERTIFICATE OF SERVICE attached.

EXHIBIT "O"

NATIONAL COMMODITY AND BARTER ASSN.

I belong to an organization called N.C.B.A. in Denver, Colorado, which has been declared by the Federal courts as a First Amendment organization.

The unlawful harassment of this organization and it's members was exemplified when the IRS, with the aid of law enforcement officers, raided the office of N.C.B.A. and stripped it of all its contents. After litigation, the records were returned, though other property is still being held in the Fed. Reserve Bank in Denver.

The IRS has issued a jeopardy assessment against N.C.B.A. (though the Court declared N.C.B.A. is not a taxpayer) in an effort to force N.C.B.A. members to disclose personal information. That which the IRS has in it's possession they are unable to use as evidence since all information obtained through the illegal raid was ruled inadmissible in any court.

Judge Matsch suggested each member

whose property was being held could claim same under 26 USC Sec. 7426, "Civil actions by persons other than taxpayers", even after stating "...the plaintiffs (NCBA) did establish substantial injury, probably irreparable, to the association and its members from the seizures made pursuant to the assessment..." CA 85-M-1064. However, action under 26 USC Sec. 7426 would be improper since that section allows a person to make a claim of interest in the property of someone who is a taxpayer and owes the IRS money. In this instance, N.C.B.A. has been declared not to be a taxpayer by the court, and the property being held established to be that of it's members. Hence, that Court's suggestion is improper, and can only be for the purpose of aiding the IRS.

The refusal of the courts to issue an injunction against the IRS causes duress of person, duress of property, and duress of imprisonment. With membership known to the IRS, many N.C.B.A.members were and are being criminally charged with I.R.C.

violations, in the same manner I was.

I feel selective prosecution is involved to effectuate the death of that organization by controlling the conduct of those within that organization. The Dist. Ct. specifically stated before my first trial that no mention of N.C.B.A. was to be made.

The U.S. Court of Appeals, 10th Cir. #85-1591, Sept. 30, 1985, acknowledged: "The warrant's overbreadth is made even more egregious by the fact that the search at issue implicated free speech and association rights ... Certainly, the organization's advocation of modifying or abolishing our country's tax system is a legitimate activity ... probable cause to believe that fraud pervaded every aspect of the NCBA was not shown, and first amendment rights are implicated."

I believe I was selected for prosecution because of my membership in N.C.B.A., violative of my 1st Amend. right.

App. 113.

EXHIBIT "P"

Another example of serving the IRS in their intimidation and propaganda program.

The Denver Post/Thursday, Nov. 15, 1984 ★ 9A

Salesman sentenced for not filing returns

By John Toohey
Denver Post Staff Writer

A former Englewood real estate salesman who failed to report more than $261,000 gross income in 1978 and 1979 was sentenced Wednesday in Denver federal court to two years in prison and fined $20,000.

U.S. District Judge Zita Weinshienk imposed the penalty on Frank Kowalik, who was once a salesman for United Farm Real Estate. He now lives in Oklahoma City.

Weinshienk refused probation for Kowalik because of his "significant lack of cooperation" with the court's probation department. The department had sought personal information to give to the judge for her sentencing determination.

The probation department said Kowalik refused to list his assets, debts, income from his real estate sales, and home mortgage status. The department also noted Kowalik showed "no remorse."

"I doubt if you will be successful on probation, as a result," the judge said.

A trial jury found Kowalik guilty Sept. 19 on two counts of failure to file returns. Weinshienk imposed the maximum penalty of a year in prison and a $10,000 fine on both counts.

Kowalik was defended by Denver attorney Cecil Hartman, who recently was barred from practicing for six months before the U.S. Tax Court in Washington, D.C., for submission of "frivolous" cases there. The court complained Hartman had submitted several cases for Colorado tax protesters claiming wages were not listed in federal law as income.

Weinshienk admonished Kowalik, saying "many people willfully don't file income tax returns, yet they use all of our civilization's facilities built with tax money. Our taxes must be paid, and this is the message I'm sending out today."

The judge allowed Kowalik to post a $20,000 cash bond so he can begin an appeal.

I apologize for the poor copies toward the center of this petition. I was unable to solicit timely professional help to correct the copy machine problems (my regular maintenance and repair man being in prison) and felt further delay in getting this petition into your hands would be intolerable. I trust this technical difficulty will not be looked upon with disfavor.

Karen Kowalik